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DECISIONS
RELATING TO
THE LIQUOR TAX LAW
OF THE

STATE OF NEW YORK - *State Commissioner of Excise*

Reported in New York Reports, Vols. 149 to 157, inclusive; Appellate Division Reports, Vols. 4 to 36, inclusive; Miscellaneous Reports, Vols. 17 to 25, inclusive, and miscellaneous unreported decisions, chronologically arranged.

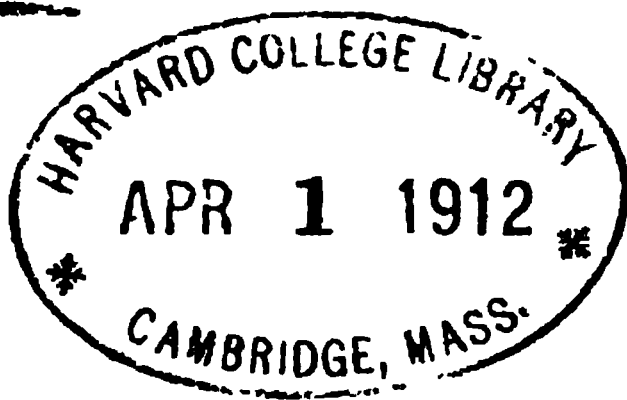
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VOLUME I.

Prepared under the direction of
PATRICK W. CULLINAN, State Commissioner of Excise.

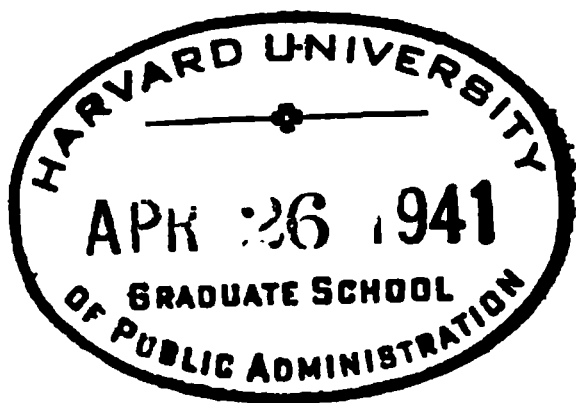
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PREFACE.

The Legislature of 1896, by enacting the Liquor Tax Law, abandoned the system of granting licenses at the will of local boards of excise established in cities and towns of the State. Under that system, those engaged in the traffic were annually at the mercy of the officials in whom the licensing power was vested, and were continually under the influence of such officials, because they had the power of revoking licenses. Under the new system, uniform and fixed rates of taxation were established, on payment of which, any person not expressly prohibited might obtain a liquor tax certificate permitting the traffic in liquors at any designated place wherein traffic was not expressly prohibited by statute, and while the right to engage in the traffic in liquors was still a privilege, it was a privilege to which all persons desiring the same had equal rights under the statute. Furthermore, citizens complaining against those engaged in the traffic were no longer compelled to appeal for relief from officials, whose action in the discharge of their duties, had been characterized by corruption, favoritism, partisanship or fraud, but on proof of any infraction of the law could obtain relief as a matter of legal right in the courts.

A comparison of the reported cases arising under the excise laws in force immediately prior to the enactment of the Liquor Tax Law with the reported cases involving the provisions of the latter statute, shows a large increase which reflects this difference between the new and the old system.

It is therefore of importance, not only that the Liquor Tax Law and its amendments, defining the rights of those engaged in the traffic and of others affected by it, should be published and distributed, but that the opinions of the courts construing the statute, should also be collated and published.

In view of the fact that the administrative, executive and judicial officers whose function it is to carry out one or another of the various provisions of the Liquor Tax Law, hold office for limited periods, and those who have become efficient through experience are succeeded by those inexperienced in excise matters, it should not be necessary for the latter to search the session laws for amendments to the general act which regulates the traffic in liquors, or to rely upon the digests annually published, imperfectly citing the reported decisions of the courts in relation to the Liquor Tax Law. Information about this statute, which annually returns a revenue of upwards of \$18,000,000, and which regulates a business

directly or indirectly affecting the personal interests of citizens everywhere, and in many ways affecting the social welfare of every community, should be accessible, and the extent to which it is accessible, will largely determine the influence which those in authority exert to execute the law.

The State Commissioner of Excise, as a necessary party to all civil litigation in any manner affecting the enjoyment of the privileges or the operation of the restrictions provided for in the Liquor Tax Law, has endeavored to aid in securing a uniformity of construction, by furnishing the courts with complete information as to previous decisions. It will be in furtherance of that policy to publish these reports, containing all opinions heretofore handed down, and hereafter, to publish from time to time supplemental volumes, containing new decisions.

PATRICK W. CULLINAN,

State Commissioner of Excise.

Dated, Albany, September 5, 1905.

THE LIQUOR TAX LAW.

Being Chapter 112, of the Laws of 1896.

AN ACT in relation to the traffic in liquors, and for the taxation and regulation of the same, and to provide for local option, constituting chapter twenty-nine of the General Laws.

Became a law March 23, 1896, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

CHAPTER XXIX OF THE GENERAL LAWS.

THE LIQUOR TAX LAW.

Section 1. Short title.

2. Definitions.

3. Abolition of boards of excise, and their powers and duties.

4. The continuance of licenses.

5. The duties of existing boards of excise.

6. State commissioner of excise.

7. Office of state commissioner.

8. Deputy commissioner; secretary, clerks.

9. Special deputy commissioner in certain counties.

10. Special agents; attorneys.

11. Excise taxes upon the business of trafficking in liquors.

12. Tax, when due and payable.

13. Officers to whom the tax is to be paid, and how distributed.

14. Compensation of county treasurers.

15. Books and blanks to be furnished by state commissioner of excise.

16. Local option to determine whether liquor shall be sold under the provisions of this act.

17. Statements to be made upon application for liquor tax certificate.

Section 18. Bonds to be given.

19. The payment of the tax and issuing of the tax certificate.
20. Form of liquor tax certificate.
21. Posting liquor tax certificate.
22. Restrictions on the traffic in liquors in connection with other business.
23. Persons who shall not traffic in liquors and persons to whom a liquor tax certificate shall not be granted.
24. Places in which traffic in liquor shall not be permitted.
25. Surrender and cancellation of liquor tax certificates.
26. Changing place of traffic.
27. Voluntary sale of liquor tax certificate.
28. Certiorari upon refusal to issue or transfer liquor tax certificates; revocation and cancellation of liquor tax certificates.
29. Injunction for selling without liquor tax certificate.
30. Persons to whom liquor shall not be sold or given.
31. Other illegal sales and selling.
32. Sales and pledges; when void.
33. Persons liable for violation of this act.
34. Penalties for violations of this act.
35. Jurisdiction of courts.
36. Collection of fines and penalties and forfeiture of bonds.
37. Duties of public officers, in relation to complaints and prosecutions under this act.
38. Penalties for neglect of public officers to perform their duty under this act.
39. Recovery of damages in a civil action.
40. Intoxication in a public place.
41. Employment of persons addicted to intoxication by common carriers.
42. Violations of this act generally.
43. Distribution of copies of this act by the secretary of state.
44. Laws repealed; saving clause.
45. When to take effect.

Section 1. Short title.—This chapter shall be known as the liquor tax law. (Then follow sections 2 to 45 inclusive.)

AMENDMENTS.

The original act, L. 1896, chap. 112, known as the Liquor Tax Law, became a law on March 23, 1896, and went into effect immediately. A slight change in § 24, sub. 1, was made by L. 1896, chap. 445, which went into effect on May 9, 1896. The first general amendatory act, L. 1897, chap. 312, amending §§ 2, 6, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 40, 42, and adding § 35a, became a law and went into effect on April 20, 1897. The next amendatory act, L. 1898, chap. 167, amending § 9 and § 14, became a law and went into effect on March 29, 1898. The next amendatory acts were L. 1899, chap. 398, amending § 16 and § 34, and L. 1899, chap. 434, amending § 9, which went into effect on April 21, 1899, and April 25, 1899, respectively. The next amendatory acts were L. 1900, chap. 257, amending § 9, which became a law on March 30, 1900, and went into effect on June 1, 1900, and L. 1900, chap. 80, which went into effect March 7, 1900, and remained in force until the enactment of L. 1900, chap. 367, amending §§ 11, 13, 16, 17, 23, 25, 28, 31, 34, 37, and adding § 25a, which became a law and went into effect on April 10, 1900. The next amendatory act was L. 1901, chap. 640, which became a law on May 2, 1901, and went into effect immediately. It amended §§ 6, 11, 16, 21, 28 and 31; added § 31a, and repealed L. 1900, chap. 367, § 8, which added § 25a. The next amendatory acts are L. 1903, chap. 115, which repeals chap. 442, L. 1897 an act supplementary to the Liquor Tax Law, and amends §§ 11, 13, and 25; and L. 1903, chap. 486, which amends §§ 2, 8, 9, 10, 11, 13, 14, 15, 18, 21, 25, 28, 31, 31a, 34, 36 and 37. These acts went into effect April 2, 1903, and May 8, 1903, respectively.

The next amendatory acts are L. 1904, chap. 205, amending § 31, sub. c; chap. 348, amending § 10; and chap. 485, amending § 24. These went into effect April 4, April 16, and April 28, 1904, respectively.

The most recent amendatory acts are L. 1905, chap. 104, amending § 24, sub. 1; chap. 677, amending § 17, subs. 5 and 8, and § 24, sub. 2; chap. 678, repealing sub. 3a of § 11; chap. 679 amending § 2; chap. 680 amending §§ 16, 23, 28, 34 and 36; and chap. 698, which added § 31b. These acts went into effect June 1, 1905, except chap. 104 and chap. 698 which became laws March 30, and June 3, 1905, respectively.

SUPPLEMENTARY ACTS.

Among the legislative acts supplemental to the Liquor Tax Law are:

Laws of 1896, chapter 900, authorizing the sale of ale and beer upon the premises of the New York State Soldiers and Sailors' Home of Bath, N. Y., and providing for the expenditure of the net proceeds therefrom.

Laws of 1897, chapter 83, providing for the audit and payment, by cities, of moneys due by reason of the termination of licenses on June thirtieth, eighteen hundred and ninety-six.

Laws of 1897, chapter 442, relating to the assessment of excise taxes in the several portions of territory consolidated to form the city of Greater New York.

Laws of 1897, chapter 742, authorizing the State Commissioner of Excise to treat that portion of the city of Rome not included within the corporation tax district limits of said city as a separate town.

Laws of 1897, chapter 775, authorizing the village of Stamford, Delaware county, to vote upon questions specified in section sixteen of chapter one hundred and twelve of the laws of eighteen hundred and ninety-six.

Laws of 1898, chapter 497, to amend chapter four hundred and thirty-nine of the laws of eighteen hundred and ninety-seven, entitled "An act to provide for the holding of annual town meetings and elections in the towns in the counties of Rockland, Orange and Sullivan."

Laws of 1903, chapter 458, authorizing the electors of the town of Newfane, Niagara county, to vote upon the local option questions specified in section 16 of the Liquor Tax Law, as restricted to the limits of the hamlet known as Olcott, situate in said town.

Laws of 1903, chapter 514, amending the Greater New York Charter relating to the sale of liquors in Wallabout Market, Borough of Brooklyn.

Laws of 1905, chapter 697, providing for the inspection of hotels and the revocation of liquor tax certificates unlawfully obtained therefor.

EXPLANATORY NOTE.

It should be borne in mind that many of the decisions relating to the Liquor Tax Law contained in this publication are not now authoritative. The Legislature has amended thirty sections of the original statute (see vol. 1, page vii), and the appellate courts have explained, modified, limited, disapproved and reversed decisions not in harmony with prevailing judicial opinion.

An examination of the table of cases will show how any particular decision may affect, or be affected by other decisions in the same case. An examination of the cases cited under any particular decision will also show how such decision may have been considered in such other cases.

The excise cases decided prior to the enactment of the Liquor Tax Law will seldom now be found directly in point, but many of the decisions therein bear historically and argumentatively upon questions of construction and practice under the present Liquor Tax Law. Pertinent propositions and phrases have been emphasized or pointed out rather than an accurate syllabus of each decision attempted.

For arrangement of decisions under the Liquor Tax Law by subjects, see third, fourth and fifth editions of the Liquor Tax Law, annotated, as published by the State Commissioner of Excise.

W. E. S.

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DIGEST OF DECISIONS

AND DICTA IN CASES ARISING UNDER EXCISE LAWS IN FORCE
PRIOR TO THE LIQUOR TAX LAW, ALPHABETICALLY
ARRANGED, WITH CITATIONS.

Aldrich v. Sager, 9 Hun, 537

Civil damage suit by husband for loss of wife's services and expenses of medical attendance occasioned by drunken son-in-law's reckless driving and upsetting carriage, from which she was thrown and injured.

Alger v. Weston, 14 Johnson, 230

Defendant offered in justification of alleged sales without license, a license issued to another for premises which it was proved had been occupied by former licensee who leased them to defendant with permission to sell under his license. Held, he could not acquire any right to sell liquors under it.

Cited,

Metropolitan Board of Excise v. Barrie, 34 N. Y. 657

Amerman v. Kall, 34 Hun, 126

Penalty action, although for a penalty, is a civil and not a criminal action and for its purpose a sale by an agent in the shop of his principal or by a servant in the shop of his master is *prima facie* a sale by the principal or master.

Cited,

Austin v. Carswell, 67 Hun, 579

Andrews v. Harrington, 19 Barb. 343

Action for penalties under 2 R. S. 481, sec. 7, selling without license. Judgment for \$25 upon one established violation. Held not reversible error to admit incompetent evidence of another violation.

Cited,

Prussia v. Guenther, 16 Abb. N. C. 230

Arhart v. Stark, 6 Misc. 579

Evidence of recovery of civil penalty for keeping house of ill fame not admissible to affect weight of testimony similarly to evidence of conviction—although the fact that the State law characterizes the act or conduct constituting the offense as a misdemeanor and the ordinance characterizes it as disorderly conduct, in no way affects or changes the essential quality of the act or conduct, and in both instances the act or conduct is the same, namely, keeping a house of ill fame.

Astheimer v. O'Pray, 16 N. Y. Supp. 470, *affirmed*, 135 N. Y. 631

Sufficiency of proof that person drank liquors resulting in damages sought to be recovered under Civil Damage Act—where deceased drank at saloon late at night, was asleep on porch early in the morning and

drank liquor from a bottle apparently containing whiskey which another witness refused for that reason and drank lager.

Austin v. Carswell, 67 Hun, 579

Plaintiff entitled to a charge that defendant may be liable civilly even though she had already been prosecuted criminally for same offense. But evidence of previous conviction is illegal.

Is principal liable for act of agent committed without knowledge or in violation of instructions?

Bacon v. Jacobs, 63 Hun, 51

Liquor dealer liable for damage resulting from acts of intoxicated person even though such person on account of bitter feeling might have committed the injury had he not been intoxicated.

Baker v. Pope, 2 Hun, 556

Civil Damage Act, L. 1873, held constitutional. Applied to licensed as well as unlicensed persons. Did not forbid sales but attached a liability for certain consequences. "It imposes upon the seller the duty of guarding his conduct so as to produce no mischievous results. He must not use his license to aid the poor in squandering the means necessary for the aid and support of families or the education of children. If his abuse of his license leads to such results, the law makes him liable for such damages as ensue. A license is not a contract depriving the Legislature of the right to act."

Cited,

Hayes v. Phelan, 5 Hun, 335; 4 Hun, 733

Dubois v. Miller, 5 Hun, 332

Jackson v. Brookins, 5 Hun, 530

Bertholf v. O'Reilly, 8 Hun, 16

Volans v. Owen, 9 Hun, 558

Franklin v. Schermerhorn, 8 Hun, 112

Quain v. Russell, 8 Hun, 319

Quain v. Russell, 12 Hun, 376

Beers v. Walhizer, 43 Hun, 254

Civil Damage Act makes no distinction between cases where wife's loss of means of support is direct result of intoxication or those in which it is remote result, so liability follows where husband is imprisoned for crime committed as a result of intoxication. If good cause of action is stated against liquor dealer, same is true of landlord.

Cited,

McCarty v. Wells, 51 Hun, 171

Bacon v. Jacobs, 63 Hun, 51

Bellinger v. Birge, 54 Hun, 511

Overseer of Poor in whose name a penalty action has been brought may settle it without order of Court, provided, etc.

Cited,

Olp v. Leddick, 14 N. Y. Supp. 41

Bennet v. Levi, 19 N. Y. Supp. 226

Having moved for non-suit in civil damage suit solely upon ground that as landlord, defendant had no knowledge that liquor was sold in premises and submitted the other facts in the case to the jury, he cannot question their sufficiency on appeal.

Jury fixes extent of compensatory damages.

Benson v. Moore, 15 Wend. 260

An innkeeper though authorized to sell to be drunk on premises, may not sell to be drunk off premises under 1 R. S. 680.

Bernstein v. Sweeney, 33 N. Y. Super. 271

Proprietor of place kept on the European plan, having rooms to rent in connection with restaurant, is the proprietor of a hotel.

Bertholf v. O'Reilly, 74 N. Y. 509, *affirming* 8 Hun, 16

L. 1873, ch. 646—Civil Damage Act, constitutional.

Though imposing on a landlord liability for damages occasioned by an intoxicated person, where the former's only connection with the injury is that he leased the premises where the liquor causing the intoxication was sold or given away, with the knowledge that intoxicating liquors were to be sold therein, such business being a lawful business and the sale or gift of the liquor in question not being contrary to any restriction upon it. "The object of the law was to prevent the impoverishment of families by reason of intoxication; to prevent the violence and injury resulting from intoxication by making those who caused the intoxication liable for the damages which resulted to others by reason thereof. The tenant may sell, but he must be careful to whom he sells, and never to sell enough to cause intoxication or to add to an intoxication which has been commenced by sales of strong drink by others." Subjecting property specially adapted for use as an inn or hotel to the resulting risks imposed by this act is not the taking of property within the meaning of the constitution.

"Pauperism, vice and crime are the usual concomitants of the unrestrained indulgence of the appetite for strong drink. Impoverishment of families, the imposition of public burdens, insecurity of life and property are consequent upon the prevalence of the great evil of intemperance." The legislature may not only regulate the traffic in liquors "but it may prohibit it." "It may create new offenses, enlarge the scope of civil remedies and fasten responsibility for injuries upon persons against whom the common law gives no remedy."

Cited,

Bacon v. Jacobs, 63 Hun, 51

People v. Lyon, 27 Hun, 180

Beers v. Walhizer, 43 Hun, 254

Volans v. Owen, 74 N. Y. 527

Neu v. McKechnie, 95 N. Y. 632

Reid v. Terwilliger, 42 Hun, 310

Dudley v. Parker, 132 N. Y. 386

Peo. ex rel. Einsfeld v. Murray, 4 App. Div. 185

Bertholf v. O'Reilly, 8 Hun, 16, *affirmed*, 74 N. Y. 509

Civil damage suit for loss of plaintiff's horse driven to death by his son while intoxicated. The legislature required the owner who alone has the power to lease and select his tenant, to assume the risks of his tenant's acts in the business of selling spirituous liquors, when such tenant caused injury by his sales.

Blasdelle v. Hewit, 3 Caines Rep. 137

In a penalty action under Rev. Laws 484, entitled "An act to lay a

duty on strong liquors and for regulating inns and taverns" which contains a proviso concerning sale of home made wines and cider not to be drunk where sold, the time and place of sale as well as the kind of liquor sold should be pleaded.

Cited,

Bennett v. Hurd, 3 Johns. 438

Teel v. Fonda, 4 Johns. 304

Blatchley v. Moser, 15 Wend. 215

Indictment for selling liquors without license no bar to penalty action. "One may be said to be a private remedy, the other a public one for the same offense."

Cited,

People v. Meakim, 133 N. Y. 225

Rollins v. Breed, 54 Hun, 485

Peo. ex rel. Meakim v. Eckman, 63 Hun, 209

Blatz v. Rohrbach, 116 N. Y. 450, *reversing* 42 Hun, 402

Failure to recover under Civil Damage Act, L. 1873, ch. 646 because of failure to show intoxication resulted from sales of "beer." The term "beer" in the absence of evidence as to its quality and effect, does not necessarily import an intoxicating beverage, as it includes both intoxicating and non-intoxicating liquors. As to strong and spirituous liquors the courts take notice of their intoxicating character and that stands in lieu of evidence. "Hitherto the courts have not been willing to take notice that lager beer is intoxicating, but have submitted the question when controverted, to the jury, to be determined upon the evidence."

"It plainly was not the intention of the legislature to prohibit the sale of numerous kinds of mild drink sold under the name of beer, and I think it may be affirmed that the term, as now used, if it imports any particular beverage, is generally understood to refer to lager."

Cited,

Blatz v. Rohrbach, 60 Hun, 170

Peo. v. Cox, 106 App. Div. 303

Matter of Cullinan v. McGovern, 94 N. Y. Supp. 525

Matter of Hunter v. Caffrey, 34 Misc. 389

Blatz v. Rohrbach, 42 Hun, 402, *reversed*, 116 N. Y. 450

Civil damage suit by wife whose husband committed suicide while intoxicated. Defendant held liable without much consideration as to character of the "beer" sold by him.

Cited,

McCarty v. Wells, 51 Hun, 171

Blatz v. Rohrbach, 60 Hun, 169

Suicide of intoxicated person who drank Spenk beer, inflicts no liability under Civil Damage Act, unless Spenk beer is proved to have caused the intoxication.

Board of Commissioners v. Burtis, 103 N. Y. 136, *affirming* 34 Hun, 624

Excise Commissioners of city of Auburn held authorized to bring penalty actions under L. 1857, as amended by L. 1873, ch. 820, and L. 1878.

ch. 109, where office of overseer of poor was abolished but duties of such office performed by Board of Charities and police.

Cited,

Standart v. Burtis, 46 Hun, 82

Peo. ex rel. Meakim v. Eckman, 63 Hun, 209

Commissioners of Excise v. Merchant, 103 N. Y. 146

Board of Commissioners v. Cosiatic, 62 How. 113

Citizen who brings suit for penalty in name of overseer of poor may be compelled to give security for costs. No hardship, for if action is well founded, he will have no costs to pay. If otherwise, then the unfortunate defendant who has been harassed by an unwarranted act of a stranger who sets the machinery of the law against him will be in part reimbursed.

Cited,

Sharp v. Fancher, 29 Hun, 193

Board of Commissioners v. Freeoff, 17 How. Pr. 442

The term "strong and spirituous liquors" includes "ale and strong beer."

Cited,

Board of Commissioners v. Taylor, 21 N. Y. 173

Board of Commissioners v. Keller, 20 How. Pr. 280

The Married Woman's Act of 1860 did not relieve a husband from liability for penalties incurred without his knowledge or assent by the wife even in the conduct of her own separate saloon business carried on in a part of their residence.

Cited,

Board of Excise Commissioners v. Dougherty, 55 Barb. 382

Board of Commissioners v. McGrath, 27 Hun, 425

Action by some other person in name of excise board which fails or neglects to bring penalty suit under 2 R. S. (5th ed.) 945, sec. 31. Complainant not required to give security for costs.

Cited,

Sharp v. Fancher, 29 Hun, 193

Montgomery v. Odell, 73 Hun, 424

Board of Commissioners of Excise of Tompkins Co. v. Taylor, 21 N. Y. 173

"Strong beer" is within the meaning of term "strong and spirituous liquors" in L. 1857, ch. 628. Semble, "any liquor is within the statute, whether fermented or distilled, of which the human stomach can contain enough to produce intoxication."

Courts will take judicial notice of the evils of the liquor traffic and the efforts to lessen them by regulating the business.

Cited,

People v. Zeiger, 6 Park. 355

Overseers v. McCann, 20 Weekly Dig. 114

Schwab v. Peo. 4 Hun, 520

Village of Deposit v. Vall, 5 Hun, 310

Prussia v. Guenther, 16 Abb. N. C. 230

Rau v. Peo. 63 N. Y. 277

Blatz v. Rohrbach, 116 N. Y. 450

People v. Schewe, 29 Hun, 122

Ripley v. McCann, 34 Hun, 112

Killip v. McKay, 13 N. Y. St. Rep. 5

Board of Excise v. Curley, 69 N. Y. 608

When a section of a statute has been amended so as to read "as follows," the amendment is substituted for the original section; so that when Excise Law of 1874 was passed the Law of 1857 in force was the original act as amended to date.

Board of Excise v. Garlinghouse, 45 N. Y. 249

County Commissioners of L. 1857 superseded by Town Commissioners of L. 1870; penalty actions maintainable by latter only.

Cited,

People v. Smith, 69 N. Y. 175

Peo. ex rel. Houghton v. Andrews, 42 Hun, 614

Bellinger v. Birge, 54 Hun, 511

Board of Excise Commissioners v. Dougherty, 55 Barb. 332

Penalty action under L. 1857 for sales without license against husband of woman owning place of sale. Defense that he was acting as her agent without proof that she held license, held untenable. "A license is not only to the person to sell, &c., but is also a license to sell liquor at a particular place. A license so issued would protect the agent or clerk of the licensee, but a person selling as the agent or clerk of a person or at a place not licensed, cannot obtain immunity by claiming that he acted for another party."

Cited,

Prussla v. Guenther, 16 Abb. N. C. 230

Board of Excise v. Sockrider, 35 N. Y. 154

There is no authority cited to sustain the proposition that the Board of Excise can confer upon an agent or attorney the right to determine what suits shall be brought against individuals for violations of the Excise Law. That duty is by law cast upon the board of commissioners—they are entrusted with an office which requires discretion and are clothed with a trust, which is to be exercised for the public good.

Brookmire v. Monaghan, 15 Hun, 16

Civil damage suit by wife for injury to means of support—resulting from death of husband through intoxication. Held that such an action was not maintainable.

Cited,

Mead v. Stratton, 87 N. Y. 493

Cady v. McDowell, 1 Lans. 484

A boarding house is not in common parlance or in legal meaning every private house where one or more boarders are kept occasionally only and upon special consideration.

Campbell v. Schlisinger, 48 Hun, 428

Action for civil damages. If barkeeper sells liquor even without knowledge of employer, it is the employer's act because the barkeeper is within the scope of his authority. But not so if he gives the liquor away, even though the statute prohibits it, because it is not within the scope of an agent's authority to give his employer's property away.

Knowledge of employer that bartender may be helping himself at the bar is not sufficient to charge him with the offense of giving liquor to a posted person.

Carpenter v. Taylor, 1 Hilt. 193

Person entering restaurant for a meal is not a guest of the proprietor even though latter may conduct a hotel elsewhere on premises.

Cited,

Kelley v. Excise Commissioners, 54 How. Pr. 327

Kopper v. Willis, 9 Daly, 460

Korn v. Schedler, 11 Daly, 234

Cochrane v. Schryver, 12 Daly, 174

Cercle Francais de l'Harmonie v. French, 44 Hun, 123

When police authorities may invade private quarters of social club or a public place temporarily under its management.

Cited,

Kenny v. Martin, 11 Misc. 651

City of Brooklyn v. Toynbee, 31 Barb. 282

The municipal ordinance declared to be void as to innkeepers licensed under general statutes in Wood v. City of Brooklyn, 14 Barb. 425, is not void *in toto*, but enforceable against hotel keepers without license. But, two penalties are not recoverable for the same act, one for the sale of liquor and another for exposing it for sale—where the latter is but an incident to the former.

Cited,

Arhart v. Stark, 6 Misc. 579

City of Buffalo v. Smith, 8 Misc. 348

A song or performance upon a musical instrument by the proprietor of a saloon, not intended to draw or secure an audience from the public, is not a violation of any law.

Burden of showing that defendant had not paid a license for permitting a concert was on the plaintiff.

Cochrane v. Schryver, 12 Daly, 174

Where lessee of building sublets basement for restaurant and himself lets rooms upstairs, he is not an innkeeper.

Commissioners of Excise v. Glennon, 21 Hun, 244

The Commissioners of Charities of the City of Yonkers upon whom the charter conferred all powers given generally to overseers of poor in towns, instead of Board of Excise of city, should bring penalty actions.

Commissioners of Excise v. Merchant, 34 Hun, 19, *affirmed*, 103 N. Y. 143

Judge charged that when liquor was seen to be drunk on premises of liquor dealer, it was *prima facie* evidence of sale with intent that it should be so drunk; also that calling for liquor and drinking same constituted *prima facie* evidence of a sale.

Held, that where a person enters a tavern or saloon and calls for whiskey or any other beverage and it is set out to him by the proprietor, and he drinks it, nothing more being said, the law implies a sale.

Commissioners v. Osterhoudt, 23 Hun, 66

Commissioners of almshouse held to have the power of overseers of poor to maintain penalty actions under L. 1857, ch. 628, sec. 14, rather than local board of excise. Also held that a license issued in August did not authorize or have a retroactive effect and legalize traffic in the month previous. Also that a license issued in the preceding August

expired on May first by its terms and afforded no protection even though applicant was entitled to have a license run for a year.

Commissioners of Excise v. Palmer, 3 N. Y. St. Rep. 200

Married woman engaged in separate saloon business is liable for penalty. Her husband is not liable and is not a proper party to action therefor.

Commissioners of Excise v. Purdy, 13 Abb. Pr. 434, *reversing* 22 How. Pr. 312

Defendant's remedy against the commencement of penalty actions by private parties without authority, is not a motion to dismiss complaint, but is a motion for security for costs.

Commissioners of Excise v. Purdy, 22 How. Pr. 312, *reversed*, 13 Abb. Pr. 434

The condition that an action for penalties shall be brought by private parties in the name of excise commissioners only when the latter have refused to institute the same on a complaint accompanied by reasonable proof of the violations charged, "is imposed not only for the safety of the commissioners and the public, but also to prevent citizens from being vexed by informers and speculators without probable cause."

Cited,

Hess v. Appell, 62 How. Pr. 314

Commissioners of Excise of Onondaga v. Backus, 29 How. Pr. 33

Where the board of excise pays informers to obtain evidence against violators of law, the board is not *particeps criminis* with the person violating the statute.

Cited,

Lyman v. Oussani, 33 Misc. 409

Comstock v. Hopkins, 61 Hun, 189

Civil Damage Act read with Excise Law imposes a condition on which a license to sell liquor is granted, viz: The condition of liability in damages for injuries to others resulting from such sale. It is true that the unlicensed dealer is a wrongdoer both civilly and criminally, but the Civil Damage Law applies with equal force to the licensed as to the unlicensed dealer, and therefore it cannot be said that the liability imposed by it is the liability of wrongdoers.

Release of one joint defendant releases all, not because they are wrongdoers, but because the statute imposes an undivided liability and there can be no apportionment of damages.

Cited,

Reinhardt v. Fritzsche, 69 Hun, 565

Conklin v. Tice, 1 N. Y. Supp. 803, *affirmed*, 127 N. Y. 670

Whenever action for civil damages will lie against liquor dealer it will lie against landlord provided he leased premises for sale of liquors or knew of such intended sale therein.

County of Allegany v. Town of Wellsville, 90 Hun, 23

Distribution of excise money to towns under L. 1892, ch. 401, except as "otherwise provided by a special or local law," not subject to L. 1890, ch. 569, and L. 1828, ch. 155, relative to towns where town poor are a county charge.

Cromwell v. Stephens, 3 Abb. Pr. (N. S.) 26

Inn, hotel and boarding-house defined.

Cronin v. Gundy, 16 Hun, 520

Penalty action for selling liquor without a license. Defendant held not to be protected by license issued in part by one who was elected to the office of excise commissioner to fill a supposed vacancy on account of a previously elected commissioner's failure to have his bond approved by supervisor within fifteen days after election. Forfeiture of the office not occasioned *ipso facto* by failure to do so—only after legal proceedings declaring it.

Cited,

Horton v. Parsons, 87 Hun, 42

People v. McDowell, 70 Hun, 1

Cronin v. Stoddard, 97 N. Y. 271

A license issued by one of three regularly elected excise commissioners and by one who succeeded another such commissioner, who had neglected to give a bond, afforded no protection and was no defense to a penalty action for sale without license, because the failure to file a bond did not create a vacancy in the office—only cause for removal which was not acted upon.

Cited,

People v. McDowell, 70 Hun, 1

Peo. ex rel. Brooks v. Watts, 73 Hun, 404

Cuniff v. Beecher, 84 Hun, 137

Magistrate before whom a person has been found guilty of disorderly conduct (intoxicated) under L. 1892, ch. 401, sec. 35, may suspend sentence during good behavior. But such suspension of sentence does not alter the fact of conviction and a civil action for false imprisonment of such person cannot be sustained.

Davis v. Standish, 26 Hun, 608

Civil damage suit by wife whose means of support were injured by intoxication of husband while fishing, which resulted in his death by drowning. Intoxication caused in whole or in part which renders one incapable of caring for himself and of protecting himself from the results of accidents or circumstances to which he was subjected by reason of which death follows, is the direct and proximate cause. If the liquor was sold without a license the fact might be considered as a basis for exemplary damages.

Cited,

Reid v. Terwilliger, 116 N. Y. 530

Reid v. Terwilliger, 42 Hun, 310

Rawlins v. Vidvard, 34 Hun, 205

Bacon v. Jacobs, 63 Hun, 51

Devoe v. Van Vranken, 29 Hun, 201

In a suit for damages occasioned plaintiff by defendant's excavations in a highway, where plaintiff had testified that his injuries made it impossible for him to work as before, it is competent proof in mitigation of damages that from constitutional condition or the excessive use of intoxicating liquors he had long been unqualified to do a full day's work.

Doorley v. McConnell, 78 Hun, 580

Violation by her grantor of covenants not to use premises for liquor traffic affords no ground for ejectment proceedings against grantee.

Driscoll v. Schultz, 31 How. Pr. 343

Constitutionality of Metropolitan Police Bill denied.

Dubois v. Miller, 5 Hun, 332

Civil Damage Act constitutional. License no protection, but evidence of sales prior to enactment of statute improper.

Cited,

Volans v. Owen, 9 Hun, 558

Mead v. Stratton, 87 N. Y. 493

Quain v. Russell, 8 Hun, 319

Dudley v. Parker, 132 N. Y. 386, *affirming* 55 Hun, 29

Liability under Civil Damage Act, L. 1873, ch. 646, dependent upon intoxication as the proximate cause of injury.

"The purpose of this statute was to place the responsibility for the injurious consequences to others than the intoxicated person, upon those who furnish the liquor which produced the intoxication of the person, by whom, while in and by reason of that condition or in consequence of it, the injury should be caused or suffered. The obligation is one of the incidents imposed by statute upon the liquor traffic. The question, when it arises, is not one of care or diligence on the part of the seller, but is simply one of cause and effect."

Dudley v. Parker, 55 Hun, 29, *affirmed*, 132 N. Y. 386

Liability under civil damage action for damages resulting from intoxication not of a person to whom liquors were directly sold, but for whom they were purchased and the dealer had reason to believe that some other person than the one to whom the same were delivered was interested in the purchase and was to drink the same in whole or in part.

DuPuy v. Cook, 90 Hun, 43

Test of injury under Civil Damage Act is not whether mother by utmost effort could just earn her living, and the fact that her son voluntarily supported her does not affect her right of action.

DuPuy v. Quinn, 61 Hun, 237

A juror's prejudice against liquor selling does not disqualify him from sitting in a case arising under Civil Damage Act, provided he is indifferent between the parties and could render an impartial verdict irrespective of what he thought of the business.

Cited,

Fortune v. Trainor, 19 N. Y. Supp. 598

Elliot v. Barry, 34 Hun, 129

When defendant in civil damage suit allowed her husband to use her saloon property under his license, the fact of her ownership does not necessarily establish her connection with the business. That question should be submitted to the jury.

Ennis v. Brown, 1 App. Div. 22

Covenants not to use premises for inn or hotel do not run with the land.

Ex parte Persons, 1 Hill, 655

Excise board not compelled by mandamus to issue license withheld because it considered liquor traffic a public evil.

Cited,

Peo. ex rel. Beller v. Wright, 3 Hun, 306

In re Bloomingdale, 38 N. Y. Supp. 162

People v. Norton, 7 Barb. 477

Kelley v. Excise Commissioners, 54 How. Pr. 327

Mayor v. Mason, 4 E. D. S. Rep. 142

Fincke v. Police Commissioners, 66 How. Pr. 318

Did the conviction of a bartender at licensed premises forfeit the license *ipso facto* under the Law of 1873? If the record of conviction does not show that the violation occurred at the licensed premises how can that information be supplied?

Injunction will not lie to restrain an illegal arrest because the law affords an adequate remedy.

Cited,

Kenny v. Martin, 11 Misc. 652

Fitch v. Casler, 17 Hun, 126

Persons attending "Fourth of July party" at a hotel upon invitation of keeper, certain accommodations being furnished for a sum, are not "guests" of the hotel and the keeper is not liable for injuries to plaintiff's horse in the latter's care. "It is not the amount of refreshments but the character under which the purchaser buys them which determines the relations of the parties."

Cited,

People v. Brede, April 1897, unreported

Ford v. Ames, 36 Hun, 571

Complaint under Civil Damage Act sufficient, where it was alleged that the intoxication from which damage resulted "was caused in whole or in part by intoxicating liquors sold or given away by the said Ames, his agents or servants at and upon said place," there being no allegation that such liquors were sold or given away to Ford. Held sufficient.

Franklin v. Schermerhorn, 8 Hun, 112

Civil damage suit. Reaffirmance of its constitutionality as a part of statute declared so by Metropolitan Board of Excise v. Barrie, 34 N. Y. 657, making every person taking a license personally responsible for the consequences involved in the sale of liquors.

Statute gives as many rights of action as there are persons injured, but a wife may recover only her own share of money lost through her husband's intoxication, not her children's share also.

Excessive verdict.

Case where party was not intoxicated solely by liquor sold by defendant.

Cited,

Volans v. Owen, 9 Hun, 558

Reid v. Terwilliger, 116 N. Y. 530

Reid v. Terwilliger, 42 Hun, 310

Aldrich v. Sager, 9 Hun, 539

Rawlins v. Vidvard, 34 Hun, 205

Furman v. Knapp, 19 Johns. 248

Conflict between charter of New York City allowing mayor to license, and State Excise Law requiring license of Excise Commissioners. Both licenses necessary.

Goodwin v. Young, 34 Hun, 252

Civil Damage Act held not to authorize a recovery for injuries done in Vermont as a result of intoxication from liquors purchased in this State.

Goram v. Cable, 17 N. Y. Supp. 662

Court not able to say as a matter of law that two men who have drunk a pint of whiskey in one day are intoxicated.

Griffith v. Wells, 3 Den. 226

One who sells liquor without license cannot recover against purchaser.

Excise Law does not have revenue for its sole purpose, because it forbids certain persons from trafficking in liquor, requires all to give a bond, etc., with a view of preventing some of the evils which are so likely to flow from the traffic in spirituous liquors.

Cited,

People v. Behan, 17 N. Y. 516

Smith v. Joyce, 12 Barb. 21

Turck v. Richmond, 13 Barb. 533

Hall v. Germain, 14 N. Y. Supp. 5, *affirmed*, 131 N. Y. 536

"A principal is always answerable civilly for the acts of the agent done within the scope of his authority." Landlord liable under Civil Damage Act if his agent leased the premises for the liquor traffic.

Cited,

Comstock v. Hopkins, 61 Hun, 189

Reinhardt v. Fritzsche, 69 Hun, 565

Hall v. Germain, 131 N. Y. 536, *affirming* 14 N. Y. Supp. 5

Landlord's liability under Civil Damage Act, L. 1873, ch. 646. Renting agent's notice of use of premises imputable to landlord. The liquor sold must have contributed in an appreciable degree to the intoxication which resulted in the injury complained of.

Cited,

O'Rourke v. Platt, 67 Hun, 71

Hall v. McKechnie, 22 Barb. 244

Penalty action for four penalties in justices court against a firm for selling liquor without license. Held, to be joint liability for sales by their clerks when they were in the store in like manner as if they had personally sold.

Hasbrouck v. Weaver, 10 Johns. 247

Husband answerable for a forfeiture in a civil suit under a penal statute (1 R. S. 680, sec. 15) incurred by his wife who sold liquor in his house without license while he was absent and without his consent.

Cited,

Board of Excise Commissioners v. Dougherty, 55 Barb. 332

Board of Commissioners v. Keller, 20 How. Pr. 280

Hayes v. Phelan, 4 Hun, 733, *corrected*, 5 Hun, 335

Civil Damage Act is constitutional. Plaintiff as the wife of deceased person claimed damages "in being deprived of the companionship of her husband and of the customary support and maintenance of herself and children" where death resulted from intoxication. Here declared that no right of recovery exists against the vendor of the liquors producing the intoxication unless a similar right existed against the person intoxicated on account of some injury to person or property, the statute only intending to throw responsibility for injurious acts of intoxicated

person on vendor of liquors. Also that the death of husband injures a wife's means of support, the loss being without injury.

Cited,

Dubois v. Miller, 5 Hun, 332
 Jackson v. Brookins, 5 Hun, 530
 Smith v. Reynolds, 8 Hun, 128
 Volans v. Owen, 9 Hun, 558
 Mead v. Stratton, 87 N. Y. 493
 Quain v. Russell, 8 Hun, 319
 Brookmire v. Monaghan, 15 Hun, 16
 Moriarty v. Bartlett, 34 Hun, 272

Hess v. Appell, 62 How. Pr. 313

Under L. 1857, when overseers of poor did not prosecute within ten days a complaint accompanied by reasonable proof, the complainant could commence penalty actions. Held that when non-resident complainant filed complaint of such a general character and against so many places, supported only by the statements of witnesses whose occupation, place of business or residence is not disclosed, the overseers of the poor were not required to act, regardless of what motives or impulses actuated the complaint, etc., etc.

Hill v. Berry, 75 N. Y. 229

Liability under Civil Damage Act for damages to wife resulting from husband's intoxication itself.

Cited,

Neu v. McKechnie, 95 N. Y. 632

Hill v. Board of Supervisors, 53 Hun, 194

Liquor dealer who gives liquor to persons, who subsequently and consequently play "rough house" with his premises, not entitled to recover under act to provide compensation for destruction of property by mob.

Horton v. Carrington, 1 How. Pr. (N. S.) 124

Sale of liquors compounded with other substances. That same were sold without license at a place not described in the complaint is immaterial where the defendant is not misled.

Horton v. Parsons, 40 Hun, 224

Penalty action for sale of liquors without a license under the statute L. 1857, ch. 628, section 13—a sale was requisite to a cause of action. "The defendant was a practicing physician and surgeon, and the evidence tends to prove that he kept whiskey and other liquors in his drug store 'for the purpose of preparing and compounding medicines.' This he had the right to do in a proper manner."

When a party keeps liquor for sale, and upon request delivers without qualification liquor called for, a sale will be presumed with an implied promise to pay, but in the absence of proof that the defendant kept liquor for sale, such presumption will not prevail and proof of intent to sell must be shown. "There may and may not have been a sale, and to constitute it required an agreement express or implied. Without the element of sale in the transaction, the act of the defendant in letting the person who obtained the liquor have it, was, in the legal sense and for the purposes of this action innocent."

Horton v. Parsons, 37 Hun, 42

Penalty actions maintainable by overseers of poor should be brought by such officer in his individual name followed by his official title.

Non-compliance with certain statutory provisions does not hinder him from commencing penalty actions as a *de facto* officer, already entered upon the discharge of his duties.

Cited,

Horton v. Parsons, 40 Hun, 224

Peo. ex rel. Brooks v. Watts, 73 Hun, 404

Ingersoll v. Skinner, 1 Den. 540

Penalty action maintainable against several defendants jointly committing one offense and judgment properly entered against each for full amount recovered.

Cited,

Hall v. McKechnie, 22 Barb. 244

Jabbitt v. Giles, 22 Hun, 274

Indefinite complaint on information and belief addressed to overseer of poor did not obligate him to sue for penalties.

Jackson v. Brookins, 5 Hun, 530

Civil damage suit. Recovery of wife against landlord, tenant and another for sale of liquor to husband who became intoxicated and was killed in a drunken fight. Rule: "If death ensues as a natural and legitimate result of the intoxication it is covered by the language of the statute." A joint action will lie against landlord and tenant, but not another liquor dealer who sold liquor at a different time and place.

Cited,

Rawlins v. Vidvard, 34 Hun, 205

Smith v. Reynolds, 8 Hun, 128

Mead v. Stratton, 87 N. Y. 493

Reld v. Terwilliger, 116 N. Y. 530

Quain v. Russell, 8 Hun, 319

Brookmire v. Monaghan, 15 Hun, 16

Morenus v. Crawford, 15 Hun, 45

Jackson v. Sandman, 18 N. Y. Supp. 894

Testimony of witnesses paid to get evidence is regarded with grave suspicion by courts and juries.

Improper evidence as to conversation between witness and another in the absence of defendant that he was satisfied of the defendant's guilt.

Pecuniary interest of jurors who had contributed or would contribute to defray expenses of excise investigations and prosecution.

Kee v. McSweeney, 15 Abb. N. C. 229

Sufficiency of reference in complaint to statute under which penalty is demanded.

Kelly v. Excise Commissioners, 54 How. Pr. 327

A lodging house without kitchen or dining-room accommodations is not a hotel, even if proprietor will send out for meals ordered by his guests. No more is a restaurant merely because its proprietor could send out for necessary bedding, etc., when a guest might be willing to lodge there under those circumstances.

A free lunch at the bar or the occasional bringing of victuals from a neighboring restaurant will not transform a saloon into a hotel.

Kenny v. Martin, 11 Misc. 651

Pool or billiard room may be a public place. Injunction will not lie to restrain police officer from making arrests in the execution of the Criminal Law. The police are expressly charged with the duty of preventing infractions of the law on all days of the week. It is for them to decide who are guilty of offenses, and whether to apprehend the offenders and take them before the proper police magistrate, to the end that he may determine, after hearing all the proofs adduced, if in the particular case there has been a violation or not. For a court to interpose by injunction restraining the police from interfering, would be to decide in advance that certain acts done upon the Sabbath would not operate as violations of law, when the manner of doing them in a particular instance might clearly establish an infraction. It would prevent the police from exercising that surveillance which their duties call for, and might defeat rather than aid the ends of justice.

Kerley v. Mayers, 10 Misc. 718

Refusal to grant a tenant license does not relieve the latter from liability to pay the rent to landlord.

Ketcham v. Fox, 52 Hun. 284

Landlord not liable to same extent as tenant even though the latter be deemed the agent of the former. Landlord is not liable for exemplary damages, unless in some way assenting to or responsible for the aggravating circumstances that furnish occasion for such damages.

Cited,

Reld v. Terwilliger, 116 N. Y. 530

Killip v. McKay, 13 N. Y. St. Rep. 5

"Strong and spirituous liquors."

"The courts take judicial notice that the common beverages sold under the name of ale and beer are intoxicating; and when drink is sold under the name of lager beer and is so near in taste and appearance that the same cannot be readily distinguished from ale or beer it is some evidence on the question whether it is intoxicating or not."

Every intelligent person knows that the process of manufacturing lager beer is the same in all essential particulars as that of making other kinds of ale and beer from grain, and that the only real difference so far as intoxicating properties are concerned is the lesser per cent. of alcohol in it.

Cited,

Blatz v. Rohrbach, 116 N. Y. 450

Koehler v. Olsen, 68 Hun, 63

That interest or right which a debtor has under Laws of 1892, chap. 401 in his license transferable only with permission of Excise Board is not property which can be reached by a creditor's action.

Korn v. Schedler, 11 Daly, 234

Court will take judicial notice that the holder of an innkeeper's license conducts a hotel.

Parties entering into business relations with the licensee and sharing its benefits will be subjected to its burdens.

Kreiss v. Seligman, 8 Barb. 439

Contract for sale of liquors not illegal and therefore not unenforceable on the ground that purchaser may put them to unlawful use by vending without license.

Lawrence v. Gracy, 11 Johns. 179

Evidence of a parol license incompetent because it could not amount to authority to sell liquors.

Lawson v. Eggleston, 28 App. Div. 52, *affirmed*, 164 N. Y. 600

What proof warrants jury in finding for plaintiff in civil damage suit.

Leicht v. Board of Excise, 46 N. Y. St. Rep. 835

The prohibition, Laws 1892, chap. 401, against licensing places within two hundred feet of a church or school held not applicable to a person whose license expired the day before said act took effect, because it expressly excepted persons previously licensed.

Cited,

Wynehamer v. People, 13 N. Y. 378

Lewin v. Johnson, 32 Hun, 408

Sale of liquor without license not indictable at common law, and is not an offense *malum in se*. Knowledge by a vendor that liquor sold was to be resold in violation of the Excise Law does not make the sale invalid.

Lovelan v. Briggs, 32 Hun, 477

Civil damage suit by widow of a man who while suffering from delirium tremens took poison and died thereby injuring her "means of support." Held, that mere proof of a sale two weeks before his death and that he had been seen coming from defendant's store intoxicated does not prove sale of liquor which caused intoxication in whole or in part, because he might have been intoxicated before entering the store and obtained no liquor there at all.

Ludwiger v. Glaessel, 34 Hun, 312

Civil damage suit. Improper to ask defendant about transfer of his property to his wife immediately after commencement of action. The mother of infant children may maintain action for all damages sustained upon being assigned the children's share by their guardian.

McCarty v. Wells, 51 Hun, 171

Intoxication need not be immediate and proximate cause of death. Statute makes no distinction between cases in which loss of means of support is the direct result of intoxication and those in which it is the remote result thereof.

When sale of one drink produced intoxication in whole or in part though followed by procurement of liquor elsewhere.

How intoxication may be proved.

McDonald v. Edgerton, 5 Barb. 560

Cited as authority that purchase of liquors at an inn is sufficient to constitute the purchaser a guest.

Cited,

People v. Brede, April 1897, unreported

McGowan v. Deyo, 8 Barb. 340

Recovery on a bond given under sec. 7 of Act of 1845 to a justice of the peace by plaintiff unsuccessfully suing for penalties in name of overseers, who have omitted to sue is not defeated by repeal of statute. Penalties under statute do not survive it, but liability under the bond does, it being a contract for indemnity and protection to overseers against costs upon a failure to recover judgment, whether from defect of proof, an oversight in conduct of proceedings or repeal of statute imposing penalties.

McNaughton v. Board of Excise, 5 Misc. 457

Boards of Excise may not be elected to refuse to grant licenses. When a town has voted directly on excise propositions, Excise Commissioners are dispensed with. When elected they are required to exercise judgment, investigate and determine as to the fitness of man and place and the needs of the particular locality.

Cited,

Peo. ex rel. Deutsch v. Dalton, 9 Misc. 247

Peo. ex rel. Muckle v. Board of Excise, 13 Misc. 537

McRoberts v. Winant, 15 Abb. Pr. 210

Statute requiring officer to file a bond not to be construed so as to defeat will of people. Construed as directory where bond was filed late.

Manchester v. Harrington, 10 N. Y. 164

Penalty action for sale "without having a license" maintainable in no-license town under L. 1845 as amended.

Where action survives expiration of overseer's term of office.

Cited,

Bellinger v. Birge, 54 Hun, 511

Hitchens v. Peo. 1 Cow. Cr. 97

Marks v. Connell, 12 Weekly Digest, 6

Evidence that "liquor" was sold is sufficient.

Matter of Bloomingdale, 38 N. Y. Supp. 162

A license to sell liquor is not a matter of right. A rule of an Excise Board adopted in the exercise of its discretion that an existing storekeeper's license must be surrendered and the place closed before a new place would be licensed—will not be disturbed.

Cited,

Matter of Schonmaker, 15 Misc. 648

Matter of Breslin, 45 Hun, 210 reversing 7 N. Y. St. Rep. 764. See also 107 N. Y. 607

L. 1857, ch. 628, did not prohibit hotel keepers from selling liquors to guests with meals although its sale as a beverage was prohibited.

Cited,

In re Whitney, 8 N. Y. Supp. 838

Peo. ex rel. Watkins v. Excise Commissioners, 4 Misc. 547

Matter of DeVaucene, 31 How. Pr. 289

Metropolitan police bill not a local one.

Was constitutional because a regulatory, not a prohibitory measure.

Part of law might be unconstitutional without invalidating remainder.

Matter of Excise License, 38 N. Y. Supp. 425

General decision in reference to review of refusal of license by Excise Board.

Cited,

Peo. ex rel. Connelly v. Murray, 38 N. Y. Supp. 177

Matter of Ketchum, 31 How. Pr. 289

Metropolitan police bill not a local one.

Was constitutional because a regulatory, not a prohibitory measure.

Part of law might be unconstitutional without invalidating remainder.

Matter of Macy, 5 App. Div. 70

Locked door not walled or boarded up still an entrance.

Cited,

Matter of Johnston v. Fogarty, April 1897, unreported

Matter of Martin, 2 How. Pr. (N. S.) 26

The Code of Civil Procedure § 3271 does not authorize the requirement that a citizen suing in the name of an overseer of the poor give security for costs.

Defendant entitled to bill of particulars showing persons to whom liquors were alleged to have been sold; or, if the plaintiff is unable to give the names of such persons, this fact should be averred with circumstances of sale sufficient to apprise the defendant of the offense charged. If the sales were made by his agent he would not have personal knowledge, yet proof of sales by his agent or servants would conclude him on the trial.

Matter of Ryan, 6 Misc. 478

Citing case where proceedings were unsuccessfully brought to remove two Excise Commissioners who refused to grant licenses on account of local prohibition.

Matter of Schomaker, 15 Misc. 648

Court reviewing refusal of Excise Board to issue license can only inquire as to whether or not fair and debatable grounds exist to form the foundation of a discretion. Different rule when reviewing revocation of license. Holder of license held responsible for conduct of place which became disorderly though he was no longer its owner nor in any way connected with the property.

Matter of Semken, 13 Misc. 488

In the absence of statutory authority the city court of New York has no jurisdiction in certiorari proceedings even though L. 1893, chap. 481 provides that the writ may be returnable to and heard by a city court.

Matter of Whitney, 3 N. Y. Supp. 838

Where saloon keepers have been accustomed to keep open between hours of 1 and 5 o'clock A. M. in disregard of L. 1873, ch. 549, neither neglect to observe it or acquiescence in its violation, will entitle any one to repeat that violation of the injunction of the law without exposing himself to the punishment therefor.

Matter of Wood v. Excise Commissioners, 9 Misc. 507

"With costs" in a special proceeding to review determination of Excise

Commissioners means costs under sec. 3240 of the Code of Civil Procedure.

Maxwell v. Gerard, 84 Hun, 537

When relationship of guest at hotel terminates.

Mayor v. Mason, 4 E. D. S. 142

Licensee has no right to traffic in liquor upon expiration of his license no matter if licensing officials did not perform their duty.

Whether defendant had a license or not "was a matter peculiarly within his own knowledge and the burden of showing that he had a license was cast upon him by proof of the fact of a sale of the spirituous liquors."

Cited,

Peo. v. Nyce, 34 Hun, 298

Kelley v. Excise Commissioners, 54 How. Pr. 327

Mayor v. Walker, 4 E. D. S. 258

Traffic in liquor prior to passage of license laws was free at common law. Excise Law not repealed by a no license vote, though in consequence of it the power to grant licenses would be suspended or taken away.

Prohibitory Act of 1855 did not immediately repeal Excise Laws of 1824 and 1827.

Mead v. Stratton, 87 N. Y. 493, *reversing* 8 Hun, 148

Recovery under Civil Damage Act, L. 1873, ch. 646, for death of husband of plaintiff while intoxicated. Joint liability of wife, who owned hotel, with her husband, who sold the liquor, depended on question of fact submitted to jury as to whether she permitted him to occupy hotel as a place of traffic.

Cited,

Conklin v. Tice, 1 N. Y. Supp. 803

Reinhardt v. Fritzsche, 69 Hun, 565

Bacon v. Jacobs, 63 Hun, 51

McCarty v. Wells, 51 Hun, 171

Beers v. Walhizer, 43 Hun, 254

Reid v. Terwilliger, 42 Hun, 310

Neu v. McKechnie, 95 N. Y. 632

Blatz v. Rohrbach, 116 N. Y. 450

Reid v. Terwilliger, 116 N. Y. 530

Dudley v. Parker, 132 N. Y. 386

Moriarty v. Bartlett, 34 Hun, 272

Metropolitan Board of Excise v. Barrie, 34 N. Y. 657

L. 1866, ch. 578, creating Metropolitan Board of Excise declared constitutional, and unexpired licenses granted within the metropolitan district under the law previously in force, L. 1857, ch. 628, afforded no protection after the former act took effect. "No one Legislature can curtail the power of its successors to make such laws as they deem proper in matters of police."

Cited,

People v. Burleigh, 1 Crim. Rep. 522

In re Bloomingdale, 38 N. Y. Supp. 162

Peo. ex rel. Beller v. Wright, 3 Hun, 306

Franklin v. Schermerhorn, 8 Hun, 112

Peo. ex rel. Connelly v. Murray, 38 N. Y. Supp. 177

Rubenstein v. Kahn, 5 Misc. 408

Peo. ex rel. Presmeyer v. Commissioners, 59 N. Y. 92
 Bertholf v. O'Reilly, 74 N. Y. 509
 Volans v. Owen, 9 Hun, 558
 People v. Meyers, 95 N. Y. 223
 Matter of Lyman v. Erie County Athletic Club, 46 App. Div. 387
 Kresser v. Lyman, 74 Fed. 765
 Hilliard v. Glese, June 1898, unreported
 Peo. ex rel. Einsfeld v. Murray, 4 App. Div. 185
 People v. Cox, 106 App. Div. 307

Montgomery v. Odell, 67 Hun, 169

Legality of certificate dependent upon election of certain excise commissioner.

Directory provision as to time excise commissioners should sit to grant licenses.

Cited,

Peo. ex rel. Davis v. Truman, 4 Misc. 247

Peo. ex rel. Watkins v. Excise Commissioners, 4 Misc. 547

Montgomery v. Odell, 73 Hun, 424, affirmed, 142 N. Y. 665

Execution cannot be issued on judgment for costs against overseer of poor in action brought by him as such. Deposit by informers to secure payment of costs awarded against them personally on account of mismanagement or bad faith not available to defendant for payment of costs against overseer.

Morenus v. Crawford, 51 Hun, 89. See 15 Hun, 45

Action brought against two hotel keepers discontinued as against one may be continued against another under Civil Damage Act.

Cause of action survived death of plaintiff.

Evidence of convictions for violations of Excise Law competent for purpose of affecting weight of testimony.

Cited,

Matter of Lyman v. Schrake, N. Y. L. J. March 18, 1901

Morenus v. Crawford, 15 Hun, 45

Civil damage suit. Complaint alleged that two different liquor dealers conspired to sell and did sell plaintiff's husband liquors resulting in his intoxication and the killing of plaintiff's horse. Charge of conspiracy treated as surplusage. Proof showed that the husband became intoxicated by liquor purchased of both dealers in separate transactions at different places instead of from liquor sold jointly by defendants. Held, that two separate, wrongful acts, committed severally by two different defendants do not warrant a joint action or joint recovery.

Moriarty v. Bartlett, 99 N. Y. 651, reversing 34 Hun, 272

Action under Civil Damage Act does not survive death of defendant.

Moriarty v. Bartlett, 34 Hun, 272, reversed, 99 N. Y. 651

In civil damage suit it was held that cause of action survived defendant and could be maintained against the estate, which, however, was declared not liable for exemplary damages.

Cited,

Ludwig v. Glaessel, 34 Hun, 312

Mundy v. Excise Commissioners, 9 Abb. N. C. 117

Reference to statute in another means the statute as amended, not as originally passed.

Special provision for a hotel keeper's license did not preclude the holding of the general ale and beer license.

Cited,

People v. Smith, 69 N. Y. 175

Murray v. Weston, 23 App. Div. 623

Covenants against traffic can be enforced as regards every one not personal guests on the covenanted premises. Such liquor only to be served with meals or in private rooms. Apartment house and hotel distinguished.

Neu v. McKechnie, 95 N. Y. 632

Recovery exemplary damages under Civil Damage Act, L. 1873, ch. 646, by son of man who killed his wife while intoxicated and committed suicide, against persons who sold the liquor which was the proximate cause of injury, without license.

Cited,

Wilber v. Dwyer, 69 Hun, 507

Bacon v. Jacobs, 63 Hun, 51

Streever v. Birch, 62 Hun, 298

Ketcham v. Fox, 52 Hun, 284

Blatz v. Rohrbach, 116 N. Y. 450

Reid v. Terwilliger, 116 N. Y. 530

Rawlins v. Vldvard, 34 Hun, 205

Reid v. Terwilliger, 42 Hun, 310, 402

Beers v. Walhizer, 43 Hun, 254

McCarty v. Wells, 51 Hun, 171

Nevin v. Ladue, 3 Denio, 437, 450, *reversing* 3 Denio, 43

Ale and strong beer are included in the term "strong and spirituous liquors," as used in 1 R. S. sec. 680, making it penal to sell such liquors without a license.

But an admission by the party prosecuted that he had sold "ale, strong beer or fermented beer," does not prove him guilty of the offense.

Cited,

Board of Commissioners v. Taylor, 21 N. Y. 173

Rau v. People, 63 N. Y. 277

Blatz v. Rohrbach, 116 N. Y. 450

Killip v. McKay, 13 N. Y. St. Rep. 5

Board of Commissioners v. Freehoff, 17 How. Pr. 442

Olp v. Leddick, 14 N. Y. Supp. 41

Excise commissioners may settle penalty action in furtherance of general public opinion upon fair and reasonable terms.

Penalty actions maintainable not because of actual indebtedness existing by contract from the person who has been guilty of an infraction of the law, but designed to be repressive of offenses punishable by quasi criminal prosecution as well as criminal.

O'Rourke v. Piatt, 67 Hun, 71

Landlord not liable under Civil Damage Act where lease was expressly conditioned against the sale of liquors and the proof showed that tenant deceived landlord throughout tenancy.

Overseer v. Warner, 3 Hill, 150

Provisions of 1 R. S. 678 requiring tavern and innkeeper to have in his house two spare beds, etc., applied only to licensed houses, so

that it was not unlawful for defendant to have sign showing that he kept a temperance hotel. .

Cited,

People v. Jones, 54 Barb. 311
 People v. Krushaw, 31 How. Pr. 344
 Mayor v. Mason, 4 E. D. S. Rep. 142
 People v. Murphy, 5 Park. 130
 In re Brewster v. Hillman, 39 Misc. 690

Palmer v. Doney, 2 Johns. Cases, 346

License granted by two of three excise commissioners without presence or consent of the supervisor—not valid, and afforded no protection. New trial granted but court directed that no testimony of any forfeiture previous to the meeting of the commissioners on the 8th of April be admitted, for public inns being for the public convenience, a traveler is not to be barred the necessary refreshments they afford from the neglect of public officers.

People v. Adams, 17 Wend. 475

Indictment for selling liquors without license need not specify names of persons to whom sales were made if unknown and so alleged. Charge of selling divers liquors to divers citizens and divers persons unknown alleges only one offense. Charge of offense on a particular date with *continuendo*—good because latter can be disregarded as surplusage.

Cited,

People v. Polhamus, 8 App. Div. 133
 Osgood v. People, 39 N. Y. 449
 People v. Sinell, 131 N. Y. 571
 People v. O'Donnell, 46 Hun, 358
 People v. Gilkinson, 4 Park. 26
 People v. Satchwell, 61 App. Div. 312
 People v. Haren, 35 Misc. 590
 People v. Huffman, 24 App. Div. 233
 People v. Schmidt, 19 Misc. 458
 People v. Ferranto, December, 1898, unreported

People v. Adelphi Club, 149 N. Y. 5

Bona fide social clubs not subject to excise taxes because they did not sell liquors within the meaning of L. 1892, ch. 401, but only distributed the same among members.

Cited,

Peo. ex rel. Rochester Whist Club v. Hamilton, 17 Misc. 11
 Matter of Lyman v. Young Men's Cosmopolitan Club, 28 App. Div. 127

People v. Andrews, 50 Hun, 591, reversed, 115 N. Y. 427

Jurisdiction of special sessions under old Excise Law. Surrender of its jurisdiction and investment of grand jury with jurisdiction. Fake club not entitled to statutory protection of *bona fide* social clubs and the question as to whether an organization has been effected for an illegal purpose is one for the jury.

Cited,

People v. Adelphi Club, 149 N. Y. 5
 Matter of Lyman v. Young Men's Cosmopolitan Club, 28 App. Div. 127

People v. Andrews, 115 N. Y. 427, *reversing* 50 Hun, 591

Withdrawal of preliminary examination before magistrate and direct presentation of case to grand jury permitted. Criminal liability of club steward upon selling liquor without a license. "Five hundred men buy a quantity of liquor, they store it and appoint an agent to manage it. On the application of one of the five hundred the agent separates a small quantity from the mass of liquor, fixes its value, delivers the quantity so separated, as directed, and receives the value or price in money. What is that but a sale? It is not an evasion of the statute; it is a violation of it."

Cited,

People v. Luhrs, 7 Misc. 503

People v. Adelphi Club, 149 N. Y. 5

People v. Bradley, 11 N. Y. Supp. 594

People v. Sinell, 12 N. Y. Supp. 40

Matter of Lyman v. Young Men's Cosmopolitan Club, 28 App. Div. 127

Peo. ex rel. Ferro v. Andrews, 3 N. Y. St. Rep. 547

License refused under L. 1882, ch. 410, on the ground that public concerts consisting of music on piano and violin to attract patrons had been given, sustained.

Peo. ex rel. Haughton v. Andrews, 104 N. Y. 570, *affirming* 42 Hun, 614

Appointment of excise commissioners in New York city under L. 1884, ch. 43.

Peo. ex rel. Killeen v. Baird, 11 Hun, 289

Defendant charged with selling liquor on Sunday tried and convicted before the city judge of Yonkers under the city charter which gave certain officers power to arrest such offenders without warrant and gave the judge power to "hear, try and determine" such charges. Held, that inasmuch as selling liquor unlawfully was an offense triable by jury when the constitution was adopted and when it was therein declared that "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever," the defendant should have had a jury trial in the city judge court.

Cited,

People v. Burleigh, 1 Crim. Rep. 522

People v. Ball, 42 Barb. 324

Argumentative allegation of offense, viz. sale of liquor "on the 13th day of October in the year and place aforesaid *which said day was the day of the week called* and known as Sunday" is a sufficient charge of Sunday violation even though the date was wrong, the same being the 12th day of the month.

Cited,

People v. Krank, 46 Hun, 632

Peo. ex rel. Sickles v. Becker, 3 N. Y. St. Rep. 202

Mandamus to compel Excise Board to act on pending complaints to revoke license. While excise commissioners have some discretion as to the order and time of the trial of cases coming within their jurisdiction, "they have no right to arbitrarily refuse to try a class of cases presented because they question the propriety of enforcing the law involved therein."

Motives and character of complainants or the method by which the witnesses obtain evidence should have very little to do with the decision of the case.

Cited,

Peo. ex rel. Welling v. Meakim, 56 Hun, 629

People v. Behan, 17 N. Y. 516

Sale without license under L. 1857, ch. 628, sec. 13, punishable criminally as well as civilly.

Cited,

Rollins v. Breed, 54 Hun, 485

People v. Charbneau, 115 N. Y. 433

Schwab v. People, 4 Hun, 520

Hill v. People, 20 N. Y. 363

Foote v. People, 56 N. Y. 321

People v. Smith, 69 N. Y. 175

People v. Hislop, 77 N. Y. 331

Peo. ex rel. Hislop v. Cowles, 16 Hun, 577

Peo. ex rel. Shortell v. Markell, 20 Misc. 149

Peo. ex rel. Jay v. Bennett, 14 Hun, 63

Proceeding instituted by relator, as owner, to recover possession of premises leased to defendant, with restriction as to the sale of liquors thereon, because sub-lessee of tenant engaged in the sale of liquor without a license, which was an "illegal trade" within the meaning of L. 1873, ch. 583, and which terminated the lease.

Cited,

Peo. ex rel. Shaw v. McCarty, 62 How. Pr. 152

Peo. ex rel. Jay v. Bennett, 14 Hun, 58

Proceedings to remove tenants for non-payment of rent. Lease restricted sale of liquors and provided that if the covenant was broken, a double rent should be paid, and construed as liquidated damages for breach of covenant aforesaid. Held, that the landlord might exact increased rent on account of different use of premises covenanted in lease; that it was rent, not liquidated damages; and for non-payment, tenant could be dispossessed.

Peo. ex rel. Jones v. Bennett, 4 Misc. 10

Rights of applicants for licenses and powers of excise commissioners summarized:

1. "That no person has an absolute legal right to receive a license.
2. That the granting or withholding of a license is within the discretion of the commissioner of excise.
3. That where an application for a license had been received and acted upon and the discretion of the commissioners exercised whether they will or will not grant a license and if in the exercise of that discretion they have not proceeded upon illegal grounds or principles, the conclusion at which they arrive upon such exercise of their discretion will not be disturbed by the court.
4. That the court itself is not vested with the powers of excise commissioners and will not determine whether a license should or should not be granted."

A return of the excise commissioners showing that in their estimation

the license applied for was not needed should be sustained where no demand was made for a more explicit return as to whether this was because they intended to limit the number of licensed places or because none were desired by the electors.

Cited,

Peo. ex rel. Hopkins v. Commissioners, 4 Misc. 380

Peo. ex rel. Deutsch v. Dalton, 9 Misc. 247

Matter of Shomaker, 15 Misc. 648

In re Bloomingdale, 38 N. Y. Supp. 162

People v. Berberich, 20 Barb. 224

Prohibitory Liquor Law in dictum declared constitutional by justice writing opinion. Held to be consistent with United States Customs Act permitting importation of liquors to be sold as imported; but judgment of conviction was reversed because defendant was deprived of preliminary examination by magistrate and indictment by grand jury, and was convicted at special sessions instead. Liquor held to be property, but see dictum as to whether or not the Legislature is not the sole arbiter and judge as to what extent public necessity requires regulation of liquor traffic the subject of such legislation being concededly proper.

Cited,

Wynehamer v. People, 20 Barb. 567

People v. Cook, 45 Hun, 36

People v. Toynbee, 20 Barb. 224; *affirmed*, 13 N. Y. 378

Peo. ex rel. Fuhry v. Board of Excise, 91 Hun, 269

Application for transfer of license.

"Boards of Excise are organized for the purpose of regulating the sale of liquors and they are clothed with power and discretion to determine whether a license shall be issued to a particular person or for a specified locality, so long as their action is within the scope of their powers, and is just and reasonable, and free from oppression it is subject to no judicial control."

It was not the intention of the Legislature to transfer the discretion vested in Boards of Excise of this State to the courts or judges.

Peo. ex rel. Funke v. Board of Excise, 24 Hun, 195

Certiorari to review the decision of a Board of Excise in refusing to revoke a license pursuant to L. 1873, ch. 549, denied. Conceding the mandatory nature of statute, it was nevertheless held that the duty to revoke was dependent solely upon the satisfaction of the board that the licensee had violated the statute—and that their decision could only be reversed for legal error. Also that "the court has no power to revoke the license, or to order a retrial or to direct the defendant to revoke the license."

Cited,

Peo. ex rel. Welling v. Meakim, 56 Hun, 626

Peo. ex rel. McGrath v. Board of Excise, 18 N. Y. Supp. 884

Dismissal of indictment on demurrer not a bar to proceedings to cancel license for same offense, viz: keeping open on Sunday.

Peo. ex rel. Muckle v. Board of Excise, 13 Misc. 537

The provisions for local option referred to in Excise Law of 1892 must have been those of the town law for voting upon town propositions.

Excise commissioners cannot arbitrarily refuse to issue licenses.

Peo. ex rel. O'Toole v. Board of Excise, 16 N. Y. Supp. 798, *affirmed*, 133 N. Y. 683

Excise Board may refuse license solely because there are already three licensed premises at the intersection of streets where a fourth license is desired, because it is vested with power "to regulate" the sale of liquor which includes the right to restrain it where necessary as well as license only places and persons of good character.

Cited,

Peo. ex rel. Ryan v. Dalton, 7 Misc. 558

Peo. ex rel. Penny v. Board of Excise, 17 Misc. 98

What charge of keeping disorderly house implies.

Proof as to location of licensed premises where descriptions differ.

Peo. ex rel. Presmeyer v. Board of Excise, 59 N. Y. 92

L. 1873, ch. 549, sec. 8, providing for cancellation of licenses by Boards of Excise for the sale of liquor on Sunday or for other violations of said act, not unconstitutional, although the licensee has no jury trial. That "the power to license the sale of intoxicating liquors and to cancel such license when granted is vested in the Legislature, has been determined by this court. The mode and manner in which this shall be done rests in the discretion of that body."

Cited,

People v. Rau, 63 N. Y. 277

Peo. ex rel. Welling v. Meakim, 56 Hun, 626

Olp v. Leddick, 14 N. Y. Supp. 41

Matter of Lyman v. Erie Co. Athletic Club, 46 App. Div. 387

Matter of Lyman v. Texer, 59 App. Div. 217

Peo. ex rel. Sprague v. Board of Excise, 91 Hun, 94

Application for license which is defective because it lacks statutory statements cannot be cured by alleging necessary facts in petition for writ of certiorari. Practice in certiorari proceedings under L. 1893, ch. 481, which statute is similar to Liquor Tax Law, sec. 28, sub. 1.

Peo. ex rel. Buckley v. Board of Police, 63 N. Y. 623

L. 1872, ch. 687, providing for distribution of certain excise money to Inebriates' Home, Kings county, not affected by L. 1873, ch. 863 so as to authorize Board of Police and Excise of Brooklyn city to contest such distribution.

Peo. ex rel. Hull v. Board of Supervisors of New York, 32 N. Y. 473

District attorney's duty to enforce Metropolitan Police Act, L. 1857, ch. 212, sec. 21. (County liable for expenses of prosecution, even where penalties recovered do not belong to county.) "It was eminently appropriate and just that each county specially benefited by the prohibition, should be charged with the duty and expense of penal enforcement within its bounds. We think this purpose was accomplished by charging the duty of prosecution on the appropriate county officer."

People v. Bradley, 11 N. Y. Supp. 594

Steward of incorporated club furnishing club members with liquors and punching holes in members' refreshment card to the value received convicted of selling without license. It was entirely immaterial whether

liquor was paid for at time of delivery, credit given or the charge indicated by punching holes in the ticket. The question as to whether the defendant had an interest in the liquor or was a mere agent delivering and keeping it for the benefit of other people is of no importance. It devolved upon defendant to prove license.

Cited,

People v. Luhrs, 7 Misc. 508

People v. Adelphi Club, 149 N. Y. 5

People v. Bradt, 46 Hun, 445

Mere arrest of defendant for keeping disorderly house not competent evidence as to proprietorship of place where liquor is sold without license. If convicted, his ownership of the place and his continued presence there might have greater weight than a pretended leasing of premises as a cover to his proprietorship. Sufficiency of allegation that one bottle of liquor was sold, without limiting same as to quantity, viz.: less than five gallons.

Cited,

Village of Cortland v. Howard, 1 App. Div. 134

People v. Brown, 16 Wend. 561

Sale of liquor without license is punishable as misdemeanor under 1, R. S. 682, although statute contains no other prohibition than the imposition of a penalty and a provision that all offenses against the provisions of the act are misdemeanors.

Cited,

Behan v. People, 17 N. Y. 516

Hill v. People, 20 N. Y. 363

People v. Hislop, 77 N. Y. 331

Peo. ex rel. Hislop v. Cowles, 16 Hun, 577

Rollins v. Breed, 54 Hun, 485

People v. Shea, 3 Park. 562

People v. Gilkinson, 4 Park. 26

People v. Brown, 6 Park. Cr. 666

Defendant charged with sale of liquor without license, who proved his license, not properly convicted of selling liquor on Sunday, when he could not legally sell liquor, because his license on its face covered the whole period for which it was issued.

Cited,

Foote v. People, 56 N. Y. 321

People v. Krank, 46 Hun, 632

People v. Buffum, 27 Hun, 216

Joint indictment charging sale of liquor without a license where proof showed a storekeeper's license to one who was discharged and a sale by the other to be drunk on the former's premises which the license did not permit. Held, that as the agent of the licensee, defendant was doing business and protected by his license, so that he also should be discharged because of variance between charge and proof.

Cited,

People v. Bradley, 11 N. Y. Supp. 594

People v. Burleigh, 1 N. Y. Crim. R. 522

Offense of public intoxication within jurisdiction of magistrate under

L. of 1867 notwithstanding provisions of Code of Criminal Procedure conferring jurisdiction on courts of special sessions.

Cited,

Peo. ex rel. Comaford v. Dutcher, 83 N. Y. 240

Peo. ex rel. Murray v. Justices, 74 N. Y. 406

People v. Putnam, 3 Park. 386

People v. Van Houton, 13 Misc. 611

Peo. ex rel. Brooks v. Bush, 22 App. Div. 363

Irregularities in conduct of election. Effect upon validity of result of local option contest.

Peo. ex rel. Dakin v. Byrne, 9 Abb. N. C. 127

Upon application for peremptory writ of mandamus to compel superintendent of police to enforce the Excise Law by closing saloons on Sunday, the return denied having intentionally permitted any violation of law, and a special verdict rendered to the effect that defendant had failed and neglected to close and keep closed certain saloons during a specified period of time. Held, that verdict did not show that the failure to do so resulted from a design to allow the law to be systematically violated. Mandamus will not lie to compel officer to do his duty during specified period long passed.

Until something has been established showing that the law is not designed or intended to be enforced a court of justice cannot interpose its authority.

People v. Capen, 26 Hun, 377

Defendant took order for liquor in no-license town of Corinth, Saratoga county, took order to his master at Glens Falls, who filled it by giving liquor ordered to servant who took it to Corinth, delivered it to the purchaser and received pay therefor.

Held, to be a sale at Corinth. Upon the whole case we think it would be a violation of law to send liquors from one town where a license permits a sale to another town where the sale is unlawful, by an agent or servant of the seller, to be delivered and pay therefor collected of the purchaser.

People v. Charbineau, 115 N. Y. 433

Sale less than five gallons without license a crime indictable under L. 1857, though not so expressly declared. Indictment charging such an offense also charging in separate count such a sale of liquor to be drunk on premises not demurrable as charging more than one offense.

Cited,

People v. Bradley, 11 N. Y. Supp. 594

People v. Huffman, 24 App. Div. 133

People v. Wilson, 151 N. Y. 409

People v. Brede, April, 1897, unreported

Peo. ex rel. Curran v. Commissioners, 12 Misc. 296 •

Refusal of excise commissioners to permit a transfer because of an alleged sufficient number of licensed places in the vicinity, followed immediately by favorable action on a similar application held to be arbitrary.

Peo. ex rel. Friel v. Commissioners, 2 App. Div. 89

Upon application to revoke a license, proof of conviction of a woman for selling liquor on Sunday at licensed premises without proof that she

sold with licensee's permission or that she was not a member of his family, etc., not sufficient because unless the licensee is convicted there must be two convictions to warrant the revocation.

Cited,

Cullinan v. Burkard, 41 Misc. 325

Matter of Lyman v. Malcolm Brewing Co., 160 N. Y. 96

Peo. ex rel. Hopkins v. Commissioners, 4 Misc. 330

A declaration by an excise board that an application for a license has been refused in the exercise of their discretion after due consideration and deliberation on the merits will not be sustained upon judicial review where it appears that the excise commissioners have arbitrarily determined not to issue any licenses because they were elected not to issue them.

Cited,

Peo. ex rel. Muckle v. Board of Excise, 13 Misc. 537

Peo. ex rel. Kidd v. Commissioners, 25 N. Y. Supp. 873

"While local option does not exist in the strict meaning of that term in this State, there is a practical local option." If excise commissioners conclude that they will grant no licenses, their decision may not be reviewed.

Peo. ex rel. Van Demark v. Commissioners of Excise, 7 Abb. Pr. 34

Mandamus will not lie to compel a Board of Excise to grant a license, especially after the expiration of the ten day session in which the statute of 1857 authorizes licenses to be issued.

"The structure of modern statutes, and especially those on the subject of excise, creates a pressure upon the courts often difficult and embarrassing. The present law has been perhaps as much as any other the subject of reproach, even to the charge of absurdity in its provisions. The duty of the court, however, without regard to those complaints, will be best discharged by the attempt to give it such fair construction as a whole and in its several parts as shall be most consistent with the apparent intent of the Legislature, without reference to the hardships or the inconvenience in particular cases."

Peo. ex rel. Watkins v. Commissioners, 4 Misc. 547

That portion of Excise Law of 1892 relative to local prohibition has reference to the system of voting for excise commissioners who should favor local prohibition. Although the last commissioner elected may have been in favor of license, the last vote of the town does not reverse local prohibition, because the commissioners act as a body,—the majority control.

Cited,

Peo. ex rel. Deutsch v. Dalton, 9 Misc. 247

Peo. ex rel. Wood v. Commissioners, 75 Hun, 226

Peo. ex rel. Wood v. Commissioners, 75 Hun, 224

Refusal of excise commissioners to issue licenses because elected as "no-license commissioners" sustained, under L. 1892, ch. 401, recognizing "local option" by electing excise commissioners under L. 1874, ch. 444.

Cited,

Peo. ex rel. Muckle v. Board of Excise, 13 Misc. 537

Peo. ex rel. Hislop v. Cowles, 16 Hun, 577, *affirmed*, 77 N. Y. 331

Habeas corpus to release one convicted in special sessions for "selling and giving" liquors to an intoxicated person in violation of L. 1857, ch. 628, sec. 18, and sentenced to pay \$25 and certain imprisonment. Statute created a new offense and provided that whoever shall sell or give away liquors thus—"shall be subject to not less than ten or more than twenty-five dollars for each offense."

Held, that the new offense was not a misdemeanor; that only the particular penalty prescribed by the statute could be imposed and the only mode of collecting it could be applied.

Peo. ex rel. Hislop v. Cowles, 77 N. Y. 331, *affirming*, 16 Hun, 577

Sale to intoxicated person in violation L. 1857, ch. 628, sec. 18 not punishable criminally but civilly.

Cited,

People v. Charbineau, 115 N. Y. 433

People v. Cramer, 22 App. Div. 189

What facts justify inference of a sale.

Information alleging facts on information and belief without stating sources of same insufficient, except as to allegation that defendant had no license because the people are not required to prove that.

Cited,

Peo. ex rel. Stevenson Brewing Co. v. Lyman, 67 App. Div. 447

People v. Cramer, 2 Park. Cr. 171

The plea of "*autre fois* convict" cannot be established without proof. Where the record does not show offenses are identical it lies with the defendant to establish by proof, aliunde, that such was the fact.

People v. Crilley, 20 Barb. 246

"Ale" not a "wine" or a "strong or spirituous liquor" within meaning of 1 R. S. 680.

Cited,

Board of Commissioners v. Taylor, 21 N. Y. 173

Peo. ex rel. Deutsch v. Dalton, 9 Misc. 247

"Florence Mission" as described not used exclusively as a church. Power of court reviewing decision of excise commissioners.

Cited,

Peo. ex rel. Simons v. Murray, 14 Misc. 177

Peo. ex rel. Ryan v. Dalton, 7 Misc. 558

Fake hotel under Excise Law of 1892 established to evade rule of Excise Board in New York city not to grant saloon licenses for three corners of intersecting streets. Decision of Excise Board sustained. Hotel not necessarily entitled to license even if it is the only one in the neighborhood. "Liquor is not necessary to the existence of a hotel."

Cited,

Peo. ex rel. Connelly v. Murray, 38 N. Y. Supp. 177

People v. Davis, 45 Barb. 494, *affirmed*, 36 N. Y. 77

Jurisdiction over sales upon boundary line of two counties or within 500 yards of such boundary given to either of such counties by 2 R. S. 727, sec. 45.

Tavern keeper's license issued under L. 1857, ch. 628, held void and affording no protection because defendant was not a resident of town where issued, and even if valid did not authorize sale of liquor in a mere saloon, and defendant was bound to show that he kept an inn, tavern or hotel and kept liquors for sale there only. General verdict, where there are several counts in indictment is not erroneous where there is one good count which is sustained by evidence.

People v. Dillman, 4 Wkly. Dig. 251

"Lager beer, if proved intoxicating, it is now well settled comes within the prohibition against strong and spirituous liquors."

It is not necessary that buyer of liquor "to be drunk on premises," should drink or intend to drink the entire contents of a glass, which he only tasted.

People v. Eastwood, 14 N. Y. 562

Witness may state whether one was under the influence of liquor.

Cited,

Lewin v. Johnson, 32 Hun, 408

McCarty v. Wells, 51 Hun, 171

Peo. ex rel. Meakim v. Eckman, 63 Hun, 209

Sale of liquor to a minor is a violation of a liquor dealer's bond conditioned that his premises shall not become disorderly.

Prescribed criminal penalty for such offense no bar to action on bond. Excise commissioners had discretion in the matter of issuing licenses under Law of 1857.

Is not licensee estopped from denying validity of bond?

Cited,

Lyman v. Shenandoah Social Club, 39 App. Div. 459

Lyman v. Brucker, 26 Misc. 594

Peo. ex rel. Gentilese v. Excise Board, 7 Misc. 415

The obvious purpose of the enactment (L. 1892, sec. 43) is to seclude the church and the schoolroom from the baneful proximity of the saloon—a beneficent policy to which by a liberal construction of the law the courts should be auxiliary. The intention of the law was that "while saloons already licensed within 200 feet of a church or school may be continued, the approach of no other saloon shall be permitted within the privileged locality," even though the applicant held a license elsewhere when the law was enacted. It would even have been competent for the Legislature to revoke a license which might have been held for a place within the prescribed limits.

Cited,

Peo. ex rel. Deutsch v. Dalton, 9 Misc. 247

Peo. ex rel. Clausen v. Murray, 16 Misc. 398

Peo. ex rel. Clausen v. Murray, 5 App. Div. 441

Peo. ex. rel. Bagley v. Hamilton, 25 App. Div. 428

Matter of Place v. Matty, 27 App. Div. 561

Matter of Lyman v. Korndorfer, 29 App. Div. 390

Peo. ex rel. Ketcham v. Excise Commissioners, 18 N. Y. Supp. 621, *affirmed*, 64 Hun, 632

When the excise commissioners refuse to issue a license, and application is made under L. 1886, ch. 496, for a writ of mandamus as therein

provided for, the court before which such proceeding is brought is authorized to summarily decide whether the discretion vested in the excise commissioners has been abused, and is not required to submit the issues to a jury as in a trial under an alternative writ of mandamus.

Peo. ex rel. Booth v. Fisher, 20 Barb. 652

Violations of Prohibitory Act of 1855 as well as all offenses which are not capital or otherwise infamous crimes are left under regulation of the Legislature in regard to trial by jury, and provision that such offenses be triable at special sessions is constitutional.

Cited,

Wynehamer v. People, 13 N. Y. 378

People v. Fitzgerald, 8 N. Y. Supp. 81

Exclusion of evidence showing names of persons found in licensed premises by accusing witness prejudicial to defendant.

Peo. ex rel. Kresser v. Fitzsimmons, 68 N. Y. 515

Regularity of appointment of Albany excise commissioners under L. 1870, ch. 175.

Cited,

Peo. ex rel. Babcock v. Murray, 5 Hun, 42

People v. Foote, 56 N. Y. 321

L. 1857, penalties, sec. 29 does not apply to all offenses specified in act. Sale without license punishable under 2 R. S. 697, sec. 40 (fixing punishment for misdemeanors not otherwise provided for).

Cited,

Rollins v. Breed, 54 Hun, 485

People v. Krank, 46 Hun, 632

People v. O'Donnell, 46 Hun, 358

People v. Hislop, 77 N. Y. 331

Peo. ex rel. Hislop v. Cowles, 16 Hun, 577

Neu v. McKechnie, 95 N. Y. 632

People v. Krank, 46 Hun, 632

People v. Charbneau, 115 N. Y. 433

Peo. ex rel. Healey v. Forbes, 52 Hun, 30

Billiard table may be kept in tavern if not used for gambling—not gambling where loser of game pays for table. Is gambling if, directly or indirectly anything else as cigars, drinks or money is at stake.

Cited,

Peo. ex rel. Silkins v. McGlynn, 62 Hun, 237

People v. French, 3 Park. Cr. 114

That one of two persons indicted together sold liquor as a clerk of the other and by his direction is no defense.

Right to preliminary examination before magistrate does not by implication destroy complainant's right to present matter directly to grand jury.

Peo. ex rel. Kopp v. French, 39 Hun, 507, *affirmed*, 102 N. Y. 583

A person who has been arrested, convicted and fined for a violation of sec. 17 of ch. 628 of L. 1857, as amended by ch. 856, L. 1869, in that he has been found intoxicated in a public place has been convicted of a "crime."

"The words 'offense' and 'crime' are used as synonyms indiscriminately, as meaning the same thing."

Peo. ex rel. Kopp v. French, 102 N. Y. 583, *affirming* 39 Hun, 507

"Offense of intoxication" created by L. 1857, ch. 628, sec. 17, as amended L. 1869, ch. 856, is a crime.

Cited,

Morenus v. Crawford, 51 Hun, 89

Peo. ex rel. Shortell v. Markell, 20 Misc. 149

People v. Gainey, 8 Hun, 60

Under L. 1870, ch. 175, sec. 3, licenses are declared to "expire at the end of one year from the time they are granted," but as May first was the time fixed for granting licenses, the commissioners very properly limited a license issued thereafter to the next May and it afforded no protection after that date.

People v. Gates, 56 N. Y. 387

L. 1870, ch. 175, sec. 2—appointment of excise commissioners in cities.

Peo. ex rel. Meakim v. Giegerich, 14 N. Y. Supp. 263

County clerk of New York county not entitled to six cent fee for filing excise bonds, filed under L. 1857, ch. 628.

People v. Gilkinson, 4 Park. Cr. 26

The use of the word "or" instead of "and" is fatal in indictment only where it renders the statement of the offense uncertain.

Continuendo in indictment charging sale of liquors without license on a particular date is harmless surplusage.

Oited,

People v. Brown, 6 Park. 666

Peo. ex rel. Schuler v. Schatz, 50 App. Div. 544

People v. Gregg, 59 Hun, 107

Proper form of indictment under code. Does common laborer, sales agent, teamster, etc., participate in manufacture of liquor? A city mayor as the head of its police is not a police official within L. 1890, chap. 163.

Oited,

People v. Olmstead, 74 Hun, 323

People v. Hannon, 13 N. Y. Supp. 117

People v. Ferranto, December, 1898, unreported

People v. Groat, 22 Hun, 164

Action under L. 1857, ch. 628, sec. 24, in the name of the people by the commissioners of excise of Cooperstown instead of in their own names, upon a license bond given under L. 1857, ch. 628, sec. 7, the breach complained of being that the licensee suffered and allowed gambling in his hotel. Held, that the want of a seal does not prevent recovering and that as the people are the obligees in the bond, it is proper to sue in the name of the people, unless there is some statutory law which requires the action to be brought in the name of some other person.

Oited,

Peo. ex rel. Meakim v. Eckman, 63 Hun, 209

People v. Hannon, 13 N. Y. Supp. 117

An alderman though sharing power of common council to appoint and

remove policemen is not a police official within the meaning of L. 1890, ch. 163.

People v. Harmon, 49 Hun, 558, *affirmed*, 112 N. Y. 686

Time is material ingredient in offense of selling liquor on Sunday, so that indictment charging this offense on two different Sundays is bad for duplicity.

Cited,

People v. Haren, 35 Misc. 590

People v. Huffman, 24 App. Div. 238

People v. Brede, Sutherland, Co. J.

People v. Harrison, 28 How. Pr. 247

Bond of innkeeper not to suffer the inn or hotel to be disorderly or suffer any gambling or "keep any billiard table or other gaming table or shuffle board within" broken if he keeps billiard table, whether gambling is suffered or not.

People v. Hart, 24 How. Pr. 289

It may be made to appear by proof that "lager beer" is a kind of "beer" forbidden by the act of 1862, but it is not sufficient in a warrant without other averments because the court cannot take judicial notice that lager beer belongs to the prohibited class.

Cited,

Blatz v. Rohrbach, 116 N. Y. 450

People v. Zeiger, 6 Park. 355

People v. Hartmann, 10 Hun, 602

Indictments against excise commissioners for issuing licenses with the freeholder's petition to persons without the ability to keep a tavern, nor the necessary accommodation to entertain travelers. L. 1857, ch. 628, abrogated by L. 1870, ch. 175, sec. 4, as amended, L. 1873, ch. 549, sec. 2, thereby dispensing with necessity for freeholder's petition, but not abrogated in respect to restrictions upon sale of liquor by small measure for use on premises.

Peo. ex rel. Kimball v. Haughton, 41 Hun, 558

Service of summons in cancellation proceedings before excise commissioners upon bartender instead of licensee waived by an appearance by attorney and adjournment without objection.

Held, that "the proceeding is evidently designed to be summary and to depend upon such reliable information as the commissioners may be able to obtain, to a reasonable certainty, establishing the existence of the necessary fact."

"The evidence was sufficient for that purpose as long as no proof whatever was given on behalf of the relator, tending to reduce its effect or in any manner excuse him from the truth of the charge it tended to prove."

Cited,

Peo. ex rel. Welling v. Meakim, 56 Hun, 626

Matter of Lyman v. Texter, 59 App. Div. 217

People v. Henschel, 12 N. Y. Supp. 46

Conviction for sale of liquors without license at auction. As to whether

there is sufficient proof of the intoxicating quality of lager beer properly submitted to jury.

Cited,

People v. Luhrs, 7 Misc. 503

People v. Hill, 20 N. Y. 363

Intoxication a crime triable by jury upon furnishing proper bail bond under L. 1857, ch. 628, as at common law.

Cited,

Peo. ex rel. Killeen v. Baird, 11 Hun, 289

Foot v. People, 56 N. Y. 321

People v. Hislop, 77 N. Y. 331

People v. Charbneau, 115 N. Y. 433

Peo. ex rel. Shortell v. Markell, 20 Misc. 149

People v. Hitchins, 39 N. Y. 454

One act of gambling a violation of L. 1851, ch. 504. Purpose of act not to regulate gambling but prohibit it.

Cited,

Peo. ex rel. Healey v. Forbes, 52 Hun, 81

People v. Hodgman, 4 Denio, 235

On the trial of an indictment for selling liquor without a license, the prosecution can only give evidence of as many distinct offenses as there are counts in the indictment.

Cited,

Schwab v. People, 4 Hun, 520

Smith v. Joyce, 12 Barb. 21

People v. Townsey, 5 Den. 70

People v. Huffstater, 5 Hun, 23

Variance. Indictment charging sale of liquors in lesser quantity than five gallons without a license. Proof was that defendant had a storekeeper's license only, but sold to be drunk on premises. Held, that "to make out the offense intended by the pleader it must be proved that the accused not only sold the liquor, but that he sold it to be drunk on the premises. Whatever is essential to be proved must be averred."

Cited,

People v. Buffum, 27 Hun, 216

People v. O'Donnell, 46 Hun, 358

People v. Bradley, 11 N. Y. Supp. 594

People v. Hulbut, 4 Den. 133

Circumstantial evidence proper in excise case as well as in homicide case; so that it was proper for witness to testify that defendant kept a bar with bottles in it.

Cited,

Vallance v. Evarts, 3 Barb. 553

People v. Jefferson, 28 Hun, 52, affirmed, 101 N. Y. 19

Indictment of person holding storekeeper's license charging him with sale of liquors to be drunk on premises without a hotel or tavern license, in violation of L. 1857, need not negative the holding of a license under L. 1869, ch. 856, for sale of ale and beer to be drunk on premises. If defendant could bring himself within provisions of that section he should do so by proof.

People v. Jefferson, 101 N. Y. 19, affirming 28 Hun, 52

Unnecessary to negative exceptions favoring certain persons besides hotel-keepers, who might sell liquor to be drunk on premises, etc., contained in L. 1869, ch. 856, sec. 4, in indictment for sale of liquors to be drunk on premises without license as an inn, tavern or hotelkeeper under L. 1857 as thus amended or as amended by L. 1870, ch. 175.

Cited,

People v. Charbineau, 115 N. Y. 433
 People v. O'Donnell, 46 Hun, 358
 People v. Bradley, 11 N. Y. Supp. 594
 People v. McIntosh, 5 N. Y. Cr. 38
 People v. O'Donnell, 46 Hun, 361
 People v. Bradley, 33 St. R. 565
 People v. Haren, 35 Misc. 590
 People v. Bates, 61 App. Div. 559
 People v. Crotty, 22 App. Div. 77
 People v. Brede, April, 1897, unreported
 Matter of Lyman v. True Friends Social and Literary Circle, N. Y. L. J.,
 Dec. 7, 1897

People v. Jones et al., 54 Barb. 311

Excise commissioners held criminally liable for corruptly granting a tavern keeper's license for a place which they knew did not comply with L. 1857 and have "at least three spare beds, and the necessary bedding for the accommodation of travelers." Duties of excise commissioners and requirements of "hotels" considered.

Cited,

Peo. ex rel. Beller v. Wright, 3 Hun, 306
 Smith v. People, 9 Hun, 446
 People v. Meakim, 61 Hun, 327
 In re Bloomingdale, 38 N. Y. Supp. 162

People v. Krank, 46 Hun, 632, reversed, 110 N. Y. 488.

Variance between proof of sale on Sunday, July 4th, without a license instead of July 3d as alleged, immaterial, because precise time was not a material ingredient.

Where an act constitutes two different offenses, punishable differently under different portions of a statute, which portion thereof shall prevail; e. g., that prohibiting the sale of liquor without license or that prohibiting unlicensed persons from selling on Sunday?

People v. Krank, 110 N. Y. 488, reversing 46 Hun, 632

Time is not essence of crime of selling liquor without license under L. 1857, as amended L. 1869, and it is unnecessary to establish that the offense charged was committed on the very day laid in the indictment. The fact that special provision is made punishing sale of liquor on Sunday whether accused has license or not, L. 1873, ch. 549, sec. 21, does not make general prohibition of sale without license inapplicable. One selling on Sunday without license would be liable to punishment under either provision but conviction under one would bar prosecution under other.

Cited,

People v. Polhamus, 8 App. Div. 133
 People v. Charbineau, 115 N. Y. 433
 People v. Huffman, 24 App. Div. 233

People v. Krushaw, 31 How. Pr. 344

Constitutionality of Metropolitan Police Bill denied.

Peo. ex rel. Kennedy v. Lahr, 71 Hun, 271

Eligibility of supervisor of city ward to office of excise commissioner under L. 1892, ch. 401, sec. 3.

People v. Lavin, 4 N. Y. Cr. 547

Variance between indictment charging sale on Sunday, May 18th, and proof showing sale April 20th—fatal.

Cited,

People v. Krank, 46 Hun, 632

People v. Luhrs, 7 Misc. 503, *affirmed*, 79 Hun, 415

The fact that one is acting as the agent of an incorporated club or association does not exempt him from criminal prosecution for selling liquors without a license to members of the club. Such clubs are subject to the police power just as individuals are. A violator can have no excuse or plea of ignorance to avoid the punishment that is fixed by legislative authority.

Cited,

People v. Adelphi Club, 149 N. Y. 5

People v. Lyon, 27 Hun, 180

The provision of L. 1857, ch. 628, that "whenever any person is seen to drink in any such shop or house, outhouse, yard or garden belonging thereto, any spirituous liquors or wines, forbidden to be drunk therein, it shall be *prima facie* evidence that such spirituous liquor or wines were sold by the occupant of such premises or his agent with the intent that the same should be drunk therein," is unconstitutional, because the defendant is entitled to have the real question at issue, namely, the question of intent determined by a jury from their own judgment upon facts legally given in evidence. If the Legislature can declare that a certain fact is *prima facie* evidence of guilt, so that a jury must convict unless the defendant explains away such evidence, it would seem to follow that it might declare what should be conclusive evidence of guilt.

People v. McDowell, 70 Hun, 1

License granted by *de facto* excise commissioner protects holder.

Peo. ex rel. Silkins v. McGlynn, 62 Hun, 237, *affirmed*, 131 N. Y. 602

A license may be revoked on breach of the conditions subject to which it was taken, but not without proof other than an assurance of guilt by men of good character where the accused denies guilt. The decision of the Excise Board is subject to review.

People v. McIntosh, 5 N. Y. Crim. 38

A complaint positively averring that defendant kept saloon and sold liquor there, and as complainant believed without a license, is sufficient to sustain the warrant. "When an act is prohibited with an exception, the exception is matter of defense."

Cited,

Matter of Lyman v. True Friends Social and Literary Circle, N. Y. L. J., Dec. 7, 1897

People v. Maxwell, 83 Hun, 157

Defendant prosecuted for selling liquor without license must show his license if he has one.

Saving clause of L. 1892 relative to repeal of existing laws under which defendants are prosecuted and punished is not *ex post facto*.

People v. Meakim, 61 Hun, 327, affirmed, 133 N. Y. 214

In criminal as in civil cases a defendant must be held to the position he assumes.

Acquittal because of variance not a bar to second indictment and defendant not then allowed to claim there was no variance.

People v. Meakim, 133 N. Y. 214, affirming 61 Hun, 327

Excise commissioners who neglect their duties by not acting upon charges laid before them under L. 1870, ch. 175, sec. 8, as amended by L. 1873, ch. 549, sec. 8, are punishable criminally under sec. 117 of the Penal Code, as well as civilly. One proceeding is not a bar to the other.

Peo. ex rel. Welling v. Meakim, 56 Hun, 626, affirmed, 123 N. Y. 660

Mandamus on application of a citizen to compel excise board to decide complaint against saloon keeper where their decision is unreasonably delayed.

Cited,

People v. Meakim, 61 Hun, 327

People v. Meakim, 133 N. Y. 220

Matter of Lyman v. Erie County Athletic Club, 46 App. Div. 387

Peo. ex rel. Welling v. Meakim, 123 N. Y. 660, affirming 56 Hun, 626

Duty of excise commissioners to act reasonably promptly upon charges preferred in citizen's proceeding to cancel license. See People v. Meakim, 133 N. Y. 214.

Mandamus will lie to compel determination.

People v. Meyers, 95 N. Y. 223

Conviction of defendant's barkeeper under L. 1873, ch. 549, for selling liquor on Sunday, forfeited *ipso facto* defendant's license issued for the premises where the violation occurred irrespective of independent remedies for cancellation of certificate.

"The act casts upon the licensee the necessity, in order to protect himself in the enjoyment of the license, of seeing to it that no violation shall be committed on the licensed premises. It is not left open to the licensee to claim, in case of the conviction of another for such violation, that it was committed without his knowledge or consent. The words 'or at the place licensed' were obviously inserted to meet this present case."

Jurisdiction in proceedings to revoke a license does not depend upon the fact of a prior conviction. "It is an independent remedy"—it supplements the provision in the prior clause, and operates as an additional restraint upon the license.

Cited,

Matter of Schomaker, 15 Misc. 648

People v. Woodman, 3 N. Y. Supp. 926

Peo. ex rel. Matthews v. Woodman, 4 N. Y. Supp. 532

Matter of Lyman v. Texter, 59 App. Div. 217

Peo. ex rel. McNutt v. Mills, 91 Hun, 142

Excise commissioners in the exercise of the discretion as to whom and

what places they will license may refuse license because the applicant is not of good moral character and because the place kept by him is frequented by disorderly women.

People ex rel. Hoy v. Mills, 91 Hun, 144

Excise commissioners may refuse license because sufficient places are already licensed in neighborhood and such refusal will be sustained unless ground assigned is not the real reason therefor.

People v. Morris, 13 Wend. 329

Statute forbidding grocers to sell liquor to be drunk on the premises applies within incorporated municipalities same as throughout the State.

People ex rel. Stiner v. Morrison, 78 N. Y. 84

General provisions L. 1870, ch. 175, not repealed or superseded by New York City Charter, L. 1873, ch. 335, sec. 25, providing for appointment of city officers and its amendment by L. 1873, ch. 549, and L. 1874, ch. 642, and clearly indicative of the intention of the legislature not to interfere with general system or place New York City upon any different footing from other cities.

People v. Mullins, 5 App. Div. 172

All parties to a misdemeanor are principals. Record of conviction of bartender not admissible in evidence against his employer, being prosecuted for the same offense. Same true of record of conviction of another bartender for another offense committed at the same time. Same true of depositions taken before magistrate in examination of said bartender.

People v. Murphy, 5 Park. Cr. 130

Hotel is none the less one because it is kept without license.

Any person whether licensed or not was punishable under L. 1857 for selling liquor on election day within one-quarter mile of the polls.

Peo. ex rel. Babcock v. Murray, 70 N. Y. 521, *reversing* 8 Hun, 579

L. 1870, ch. 175, sec. 2, does not legally authorize verbal appointment of excise commissioners.

Peo. ex rel. Cairns v. Murray, 13 Misc. 522, *reversed*, 148 N. Y. 171

Purpose of restricting traffic near schools and churches and reason for exceptions.

Held that construction of a church or school near a saloon is with notice of latter's established rights.

Peo. ex rel. Cairns v. Murray, 148 N. Y. 171, *reversing* 13 Misc. 522

What constitutes a building used exclusively as a schoolhouse. Traffic near schoolhouse under exception contained in L. 1893, ch. 480, sec. 43, a personal privilege.

Purpose of exception.

Cited,

Peo. ex rel. Clausen v. Murray, 16 Misc. 398

Peo. ex rel. Clausen v. Murray, 5 App. Div. 441

Peo. ex rel. Bagley v. Hamilton, 25 App. Div. 428

Matter of Place v. Matty, 27 App. Div. 561

Matter of Lyman v. Korndorfer, 29 App. Div. 390

Matter of Lyman v. Monahan, 48 App. Div. 275

Matter of Adriance v. Ramage, 59 App. Div. 439

Matter of Ritchie v. Samuely, 18 Misc. 841

Peo. ex rel. Sweeney v. Lammerts, 18 Misc. 343

Matter of Zinzow v. Schmidt, 18 Misc. 658

Matter of Kessler v. Cashin, 28 Misc. 336
Matter of Lyman v. Monahan, 28 Misc. 408
Matter of Lyman v. Lazarowitz, N. Y. L. J., June 7, 1899
Matter of Lyman v. Kissel, N. Y. L. J., June 7, 1899

Peo. ex rel. Clausen v. Murray, 16 Misc. 398

Obvious policy of statute restricting traffic near school. Schoolhouse and saloon on same street but entrance to latter on another street. Building occupied exclusively as a schoolhouse by Christian Brothers. "Additional use incidental only and no way inconsistent with its primary and paramount use as a schoolhouse—under control of school authorities and instrumental to the end of imparting instruction;" and "so trivial and insignificant as not to detract from the pervading character of the building as a resort for learning."

Cited,

Matter of Piace v. Matty, 27 App. Div. 561
Matter of Zinzow v. Schmidt, 18 Misc. 653
Matter of Holden v. McCusker, 23 Misc. 446
Matter of Lewis v. Pilchen, 26 Misc. 532

Peo. ex rel. Connelly v. Murray, 38 N. Y. Supp. 177

An excise board demanding the surrender of an outstanding retailer's license before granting a license for a new place in a city where 6,500 licenses are already in force may also decline outright to issue a license for a particular place because immediate public necessity or convenience does not demand it.

Cited,

Matter of Schomaker, 15 Misc. 648

Peo. ex rel. Macy v. Murray, 5 App. Div. 66

Saloon traffic near school, on fifth floor of department store. "Accessibility not the only thing aimed at. It was the vicinity, the neighborhood, the surroundings of the school which the statute was enacted to protect." Locked door still an entrance and the fact that the proprietor promised to keep it locked or fact that his license could be revoked for breach of faith does not permit excise board to disregard the plain statute.

Cited,

Matter of Lyman v. Reynolds Bros., N. Y. L. J., Dec. 19, 1900
Matter of McMonagle v. Wainwright, 41 Misc. 413

Peo. ex rel. Redfield v. Murray, 87 Hun, 393, affirmed, 147 N. Y. 117

With the propriety of the granting of a license by excise commissioners, even though once refused, the court reviewing such action has nothing to do. The right of review is limited to cases where the license is refused.

Cited,

Matter of Schomaker, 15 Misc. 648
Matter of Bloomingdale, 38 N. Y. Supp. 168

Peo. ex rel. Schulz v. Murray, 2 App. Div. 607

Refusal of excise commissioner to grant license for place which until six weeks prior to application had been disorderly sustained notwithstanding proof that the new applicant was of good moral character and intended to run a hotel for men only.

Peo. ex rel. Simons v. Murray, 14 Misc. 177

Building may be used exclusively for church though pastor or janitor live there. What papers may be considered upon review of determination not to issue license.

Peo. ex rel. Steffan v. Murray, 2 App. Div. 359

Removal of excise inspector after refusal to resign his civil service position as such.

People v. Norton, 7 Barb. 477

Excise commissioners under 1 R. S. 677 did not act solely as judicial officers. They did exercise discretion but their duties were so plainly defined that a wilful disregard of them by issuing a license to a man not of good moral character, without necessary accommodations to entertain travelers and for a place not absolutely necessary, subjects the commissioners to indictment.

Cited,

Peo. ex rel. Beller v. Wright, 3 Hun, 306
In re Bloomingdale, 38 N. Y. Supp. 162
People v. Jones, 54 Barb. 311

Peo. ex rel. Lotz v. Norton, 76 Hun, 7

Consent of parties does not give Court of Special Sessions jurisdiction not conferred by statute.

Information which does not charge sale of liquor in a prohibited manner will not support a warrant.

People v. Nowak, 5 N. Y. Supp. 239

Information insufficient because it did not state particulars of a specific offense.

Cited,

People v. Olmstead, 74 Hun, 323
Nowak v. Waller, 10 N. Y. Supp. 199

People v. O'Donnell, 46 Hun, 358

Indictment for selling without license. Demurrable because it charged sales on divers days to divers persons.

Cited,

People v. Harmon, 49 Hun, 558
People v. Andrews, 74 App. Div. 542
People v. Haren, 35 Misc. 590
People v. Huffman, 24 App. Div. 233

People v. Olmstead, 74 Hun, 323

Information upon which a defendant is tried at Special Sessions must sufficiently show the particular offense charged and the time of its commission.

Cited,

Village of Cortland v. Howard, 1 App. Div. 131
People v. Polhamus, 8 App. Div. 133
Peo. ex rel. Ward v. Ford, January, 1902, unreported
People v. Bates, 61 App. Div. 559

People v. O'Rourke, 3 Hun, 225

Construction of following laws in harmony:

1857, ch. 628.

1869, ch. 856, *amendatory*.

1870, ch. 175, *re-enactment*.

L. 1857, provided two kinds of licenses:

1st. To tavern keepers permitting sale of liquors to be drunk on premises.

2nd. To storekeepers in small measure, not to be so drunk.

Cited,

Smith v. People, 9 Hun, 446

Jefferson v. People, 28 Hun, 52

People v. Osgood, 39 N. Y. 449

Indictment charging sale of liquor to a person named and "divers other citizens" not bad for duplicity. Election by district attorney as to kind of liquor sold, unnecessary, unless trial court directs. Authority of agent to act for defendant a question for the jury.

Cited,

People v. Polhamus, 8 App. Div. 133

People v. O'Donnell, 46 Hun, 358

People v. Huffman, 24 App. Div. 233

People v. Schmidt, 19 Misc. 458

People v. Ferranto, December, 1898, unreported

People v. Owens, 91 Hun, 344, *affirmed*, 148 N. Y. 648

Evidence showing glasses on bar in front of three men in a locked room unsupported by proof that the glasses contained liquor, when or why or by whom they were placed there, or who the men were, is insufficient to sustain a charge that the man behind the bar sold liquor or exposed it for sale on Sunday.

People v. Owens, 148 N. Y. 648, *affirming* 91 Hun, 344

Proof of sale on Sunday, held insufficient in case where defendant was seen behind bar, three men in front of it and two glasses on bar with liquid which could not be described by witness.

Cited,

People v. Ryan, 86 App. Div. 524

People v. Page, 3 Park. 600

Violator of Excise Law need not be taken before a magistrate prior to indictment.

Under Excise Law of 1857 only licensed dealers could commit the offense of selling liquor on Sunday. It was therefore necessary to aver this fact in indictment.

Peo. ex rel. Bishop v. Palen, 74 Hun, 289

Test oath of excise commissioner under L. 1890, ch. 163, sec. 3, that he is not interested in sale or manufacture of liquor is unconstitutional.

People v. Polhamus, 8 App. Div. 133

Exact time when liquor is charged to have been sold without license need not be specified in information. Names of persons to whom sales were made or statement that the names were unknown unnecessary where informants' names were designated. It is within the discretion of the Court to allow the reading of an affidavit to refresh memory of a witness.

Cited,

People v. Shaver, 37 App. Div. 21

People v. Putnam, 3 Park. Cr. 386

Right to jury trial secured by constitution does not cover certain crimes

which have already been punished summarily. But under Law of 1857 a person charged with being intoxicated in a public place is liable only after indictment unless he elects to be tried before a magistrate.

Cited,

People v. Burleigh, 1 Crim. Rep. 522

People v. Austin, 49 Hun, 398

Peo. ex rel. Murray v. Justices, 74 N. Y. 406

Peo. ex rel. Comaford v. Dutcher, 83 N. Y. 240

People v. Quant, 12 How. Pr. 83

Prohibitory Act of 1855 sustained, but notice reference to original packages.

Cited,

Wynehamer v. People, 13 N. Y. 378

People v. Nyce, 34 Hun, 298

People v. McIntosh, 5 N. Y. Cr. 38

Matter of Lyman v. True Friends Social and Literary Circle, N. Y. L. J., Dec. 7, 1897

People v. Rau, 63 N. Y. 277

L. 1857, ch. 628, sec. 21, as amended L. 1873, ch. 549, sec. 5. Judicial notice of intoxicating liquors. "As to such well known beverages as whiskey, brandy, gin, ale and strong beer, the courts without proof, acting upon their own knowledge derived from observation, will take notice that they are intoxicating and will therefore require no proof of the fact. But there are doubtless intoxicating beverages which are not so well known and of whose character the courts could not take notice, and more intoxicating beverages may yet be discovered. As to all such, when one is charged with selling them in violation of law, there must be proof that they are intoxicating before a conviction can be had. Hitherto, the courts have not been willing to take notice that lager beer is intoxicating, but have submitted the question, when controverted, to the jury to be determined upon the evidence."

Cited,

Blatz v. Rohrbach, 116 N. Y. 450

People v. Schewe, 29 Hun, 122

Killip v. McKay, 13 N. Y. St. Rep. 5

Peo. ex rel. Simermeyer v. Roosevelt, 1 App. Div. 434, affirmed, 151 N. Y. 675

See also, same case, 2 App. Div. 498.

Removal of police officer, charged with neglect of duty for not obeying instructions of superior to follow every person seen entering a saloon.

Peo. ex rel. Simermeyer v. Roosevelt, 2 App. Div. 498

The testimony of a public officer who detects a violation of law does not need corroboration.

Cited,

People v. Roosevelt, 5 App. Div. 330

Cullinan v. Trolley Club, 65 App. Div. 202

Cullinan v. Rorphuro, 93 App. Div. 203

People v. Ross, 17 Hun, 591

Sale of liquor to a minor in violation of L. 1857, ch. 628, sec. 15, as amended by L. 1877, ch. 420.

Boy was given money and sent for whiskey by an adult to whom he delivered as yet untouched by him the whiskey purchased of defendant,

and by whom he was given some which caused intoxication. Held, to be a sale to boy, who was not a mere agent or representative as defendant claimed in an attempt to apply a principle of commercial law to a criminal case.

People v. Safford, 5 Den. 112

The sale of liquors under direction and prescription of a licensed physician without proof that it was prescribed for medical purposes is unlawful. "The sale so far as respects the vendor must be made in good faith, to enable the patient to follow the advice of his physician. A mere sham prescription could be of no possible avail but to aggravate the offense."

Cited,

Smith v. Joyce, 12 Barb. 21

People v. Schewe, 29 Hun, 122

Whether lager beer is intoxicating or not is for the jury to decide. It is not improper to ask a defendant whether his license has been previously revoked for a violation of the Excise Law. Proceedings to revoke a license are in the nature of a trial and the accused is entitled to notice.

Cited,

Peo. ex rel. Welling v. Meakim, 56 Hun, 626

People v. Schwab, 4 Hun, 520

Held, that L. 1857, ch. 628, sec. 15, though rendered inapplicable to City of New York by L. 1866, ch. 378, was restored by L. 1870, ch. 175. Under statute regulating sale of "strong or spirituous liquor or wines," it is unnecessary for the prosecution to prove that the wine alleged to have been sold was of intoxicating nature. "The law in plain terms prohibited the sale of wine, etc. This included all wines used for drinking."

Comments upon evidence of informer and the necessity therefor, held not to withdraw decision and control as to its credibility from the jury.

Allegation in indictment as to place of sale at seller's place of business in Ninth Ward, New York City, sufficient without stating number and name of street.

Cited,

People v. Maxwell, 83 Hun, 157

People v. McIntosh, 5 N. Y. Cr. 38

People v. Sergeant, 8 Cow. 139

Paying for billiard table by loser not gaming. Illegal gaming implies gain and loss between the parties by betting, such as would excite a spirit of cupidity.

Cited,

Peo. ex rel. Healey v. Forbes, 52 Hun, 30

People v. Harrison, 28 How. Pr. 247

People v. Shaver, 37 App. Div. 21

Under L. 1892 separate and distinct offenses of selling liquor without a license could be set forth in the information upon which a defendant could be tried at Special Sessions.

Alternative sentence of imprisonment for non-payment of fine could also be imposed.

People v. Shea, 3 Park. Cr. 562

Whether offense is punishable both civilly and criminally under the same statute is a question of legislative intent.

Cited,

Rollins v. Breed, 54 Hun, 485

People v. Sinell, 12 N. Y. Supp. 40, *affirmed*, 131 N. Y. 571

Upon prosecution for sale of liquor without license the defense was that the liquors were the property of a social club, of which defendant was the treasurer and his son the steward and that the liquors were furnished by defendant and his son only to members of the club, and the money paid by them therefor was received and used by defendant as treasurer, to pay the expenses of the club. Jury found it was a fake club but main defense was not sustainable even if this was not the fact.

Cited,

People v. Luhrs, 7 Misc. 503

People v. Adelphi Club, 149 N. Y. 5

People v. Sinell, 131 N. Y. 571, *affirming* 12 N. Y. Supp. 40

Under L. 1857, ch. 628, prohibiting sale without license, each sale constitutes a separate offense and the acquittal of a defendant on a charge of selling on and after a certain date is no bar to an indictment and conviction for a sale made prior to the transactions to which the record of acquittal relates.

People v. Smith, 1 Park. Cr. 583

State has a constitutional right not conflicting with that of congress to impose duties upon liquors from foreign countries by requiring the procurement of a license for their sale, whether retailed, peddled, auctioned, etc. Principal criminally liable for act of clerk in selling liquors with knowledge and authority.

People v. Smith, 9 Hun, 446, *reversed*, 69 N. Y. 175

L. 1870, ch. 175, declared to be the last emanation and expression of the legislative will in respect to the sale of intoxicating drinks and is necessarily controlling, conclusive and exclusive upon the subject except where it distinctly retains the old law, thereby repealing restrictive provisions of L. 1857 and L. 1869 relative to sale of liquors to be drunk on premises.

Cited,

People v. Hartmann, 10 Hun, 602

People v. Smith, 69 N. Y. 175, *reversing* 9 Hun, 446

L. 1857, ch. 628, a general Excise Law, not repealed by L. 1870, ch. 175, the principal purpose of which was to change excise boards from county to city, town and village boards. But, semble, that the provision of 1857 act requiring petition of twenty freeholders as a condition precedent of granting of innkeeper's license is repealed. License issued under 1870, purporting to permit sale of liquors to be drunk on premises no protection to person not also a tavern keeper.

Outlined history of regulations on traffic in liquor to be drunk on prem-

ises. Restriction upon traffic between one and five o'clock in the morning applies to all licensed places, not bars only.

Cited,

Peo. ex rel. Brown v. Van Hoesen, 62 How. Pr. 76
 Jefferson v. People, 101 N. Y. 19
 Jefferson v. People, 28 Hun, 52
 People v. Hartmann, 10 Hun, 602
 Mundy v. Excise Commissioners, 9 Abb. N. C. 117

People v. Smith, 28 Hun, 626, *affirmed*, 92 N. Y. 665

Purchaser of liquor is not accomplice.

Cited,

People v. Emerson, 5 N. Y. Supp. 374

People v. Stevens, 13 Wend. 341

It is undoubtedly competent for the legislature to subject any particular offense, both to a penalty and a criminal prosecution; it is not punishing the same offense twice; they are both parts of one punishment; they both constitute the punishment which the law inflicts upon the offense. That they are enforced in different modes of proceeding and at different times does not affect the principle.

Cited,

People v. Gilkinson, 4 Park. 26
 People v. Meakim, 133 N. Y. 224
 Blatchley v. Moser, 15 Wend. 215
 Behan v. People, 17 N. Y. 516
 Hill v. People, 20 N. Y. 363
 People v. Hislop, 77 N. Y. 331
 Peo. ex rel. Hislop v. Cowles, 16 Hun, 577
 Rollins v. Breed, 54 Hun, 485
 Peo. ex rel. Meakim v. Eckman, 63 Hun, 209
 People v. Shea, 3 Park. 562

Peo. ex rel. Martin v. Symonds, 4 Misc. 6

While Excise Laws of 1892 seem to recognize the existence of a local option statute there was none in fact, and an Excise Board elected upon pledges not to issue licenses have no right to refuse them arbitrarily for that reason but must consider applications upon their merit.

Cited,

Peo. ex rel. Davis v. Truman, 4 Misc. 247
 Peo. ex rel. Hopkins v. Commissioners, 4 Misc. 330
 Peo. ex rel. Deutsch v. Dalton, 9 Misc. 247
 Peo. ex rel. Muckle v. Board of Excise, 13 Misc. 537

People v. Tighe, 5 Hun, 25

L. 1857, ch. 628, secs. 25-26, providing for revocation of license by Special Sessions on show cause order following a "conviction or judgment" either in a suit for a penalty or upon a bond, not superseded by L. 1873, ch. 549, sec. 4, but the latter act gives an additional remedy so that "conviction" in a criminal court *ipso facto* revokes a defendant's license and thereafter affords no protection. Violations of the law are misdemeanors and courts are required to instruct grand juries on the subject.

Cited,

People v. Meyers, 95 N. Y. 223
 Fincke v. Police Commissioners, 66 How. Pr. 318

People v. Tiphaine, 3 Park. Cr. 241

The Act of 1855 being unconstitutional the previous Excise Law was left in force, notwithstanding the clause in the Act repealing all previous inconsistent statutes.

People v. Townsey, 5 Den. 70

Indictment under Act of 1845 for selling liquor without license valid though it also alleged that the electors of the town had voted no license, the latter averment being surplusage.

Adoption of local option does not repeal statute prohibiting sale of liquor without license. Repeal of statute without any saving clause extinguishes offenses against it.

Cited,

Schwab v. People, 4 Hun, 520

Smith v. Joyce, 12 Barb. 21

Mayor v. Walker, 4 E. D. S. Rep. 258

People v. Toynbee, 20 Barb. 168, affirmed, 13 N. Y. 378

Intoxicating liquor is property, the sale of which may be restricted and regulated but not prohibited. Certain portions of Prohibitory Act of 1855 held unconstitutional.

Cited,

Wynehamer v. People, 20 Barb. 567

People v. Toynbee, 13 N. Y. 378, affirming 20 Barb. 168

The Prohibitory Act, L. 1855, did not discriminate between liquors existing and such as might thereafter be acquired by importation or manufacture, and does not countenance or warrant any defense based upon such distinction so it cannot be sustained in respect to any such liquor whether existing or acquired subsequently, although it would be competent to pass an act plainly prospective as to the property on which it should operate.

The criminal proceeding in a court of special sessions authorized by this act was unconstitutional, because the accused was deprived of his right to trial by jury.

Cited,

People v. Krushaw, 31 How. Pr. 344

Peo. ex rel. Davis v. Truman, 4 Misc. 247

Held that excise commissioners elected because not favorable to license, "have an undoubted right, relying upon their own judgment, supported by a majority of legal voters, to refuse all licenses and thus establish in fact, local prohibition under the law" of 1892.

Cited,

Peo. ex rel. Watkins v. Excise Commissioners, 4 Misc. 547

Peo. ex rel. Wood v. Commissioners, 75 Hun, 227

People v. Utter, 44 Barb. 170

Criminal liability of principal for violations of bartender not established by mere proof of sale by latter at former's place of business. Evidence must show that "defendant in some way participated in it, connived at it or assented to it," which fact is one for the jury to determine.

Cited,

Cullinan v. Burkard, 41 Misc. 327

Peo. ex rel. Brown v. Van Hoesen, 62 How. Pr. 76

Code of Civil Procedure relative to liberties of jail did not repeal special provisions of Excise Law in conflict therewith providing that persons against whom body execution had been issued on judgment for penalties should not have such liberties.

People v. Van Zant, 2 Park. Cr. 168

Selling liquor on Sunday not indictable at common law, nor under 2 R. S. 4th Ed. even by innkeepers to persons not guests.

People v. Vosburgh, 76 Hun, 562

The Excise Law of 1892 did not supersede by implication L. 1887, ch. 679, prohibiting sale of five gallons or more of liquor in any town, village or city where retail licenses are not granted, because it did not furnish any substitute or in any manner conflict with it.

Peo. ex rel. Decker v. Waters, 4 Misc. 1

Under Excise Law of 1892 applicants for licenses were required to possess certain qualifications. When these conditions precedent were found to exist excise commissioners were required to consider the application and such other facts as they deemed pertinent. Then in the exercise of their discretion they granted or denied the application. In certiorari proceedings under L. 1893, ch. 481, the courts may not examine the facts and having reached a different conclusion from the excise board command the board to issue a license.

Cited,

Martin v. Symonds, 4 Misc. 6

Peo. ex rel. Davis v. Truman, 4 Misc. 247

Peo. ex rel. Watkins v. Excise Commissioners, 4 Misc. 547

Peo. ex rel. Deutsch v. Dalton, 9 Misc. 247

Matter of Schonmaker, 15 Misc. 648

In re Bloomingdale, 38 N. Y. Supp. 162

Peo. ex rel. Brooks v. Watts, 73 Hun, 404

"Requirement that test oath of excise commissioner be taken 'before an officer duly authorized to take the acknowledgment of deeds' was directory and did not prevent its being taken before any officer authorized to administer oaths."

Peo. ex rel. Cochrane v. Wells, 11 Misc. 239

When excise commissioners act upon an application for the transfer of a license but thereafter and before performing the ministerial act of issuing the permit discover certain protests on file previously overlooked they have no power to reconsider the application and deny it.

People v. Wheelock, 3 Park. Cr. 9

What "beer" is "strong and spirituous liquor." Immaterial variance between proof and indictment as to kind of "beer."

Cited,

Board of Commissioners v. Taylor, 21 N. Y. 173

Rau v. People, 63 N. Y. 277

Blatz v. Rohrbach, 116 N. Y. 450

Killip v. McKay, 13 N. Y. St. Rep. 5

Peo. ex rel. Gillane v. Woodman, 5 St. R. 318

Excise commissioners cannot refuse a license because a part of the building is used some part of the time as a place of public amusement.

Peo. ex rel. Kruse v. Woodman, 1 N. Y. Supp. 335

Under L. 1886, ch. 496, mandamus rather than certiorari is the remedy to review the refusal of excise commissioners to grant a license. Issues of fact on the alternative writ may be tried before a jury, though finally disregarded by justice determining the proceeding.

Peo. ex rel. Kruse v. Woodman, 4 N. Y. Supp. 554, *affirmed*, 123 N. Y. 634

Verdict of jury on issue as to parties to be interested in license should not be disregarded on application for mandamus to compel excise commissioners to issue a license. Declarations of a party alleged to be interested inadmissible, unless made in applicant's presence, with his knowledge or by his agent.

Peo. ex rel. McGoldrick v. Woodman, 3 N. Y. Supp. 926

License revoked for unlawful sale of liquor to a minor by bartender. Under L. 1857, ch. 628, "there was no clause prohibiting in so many words the sale of liquor to a minor by the wife, servant, employee or other agent of a licensee, though it is by no means certain that the maxim '*qui facit per alium facit per se*,' would not apply here just as clearly as in ordinary cases of agency." But under L. 1877, ch. 420, which expressly prohibits such sales, then all doubt is removed.

Peo. ex rel. Matthews v. Woodman, 4 N. Y. Supp. 532

Under L. 1873, a license in force was forfeited *ipso facto* upon conviction of bartender though the violation was committed while the license for the preceding year was in force. Upon such conviction the excise commissioners were acting properly and within their duty when they demanded the return of such license and subsequently actually took it away from the licensed premises.

People v. Worsley, 1 N. Y. Supp. 748

Excise commissioners were convicted because they issued hotel license to person without ascertaining whether he kept a hotel in the legal sense of that term.

Peo. ex rel. Beller v. Wright, 3 Hun, 306

Certiorari to review proceedings under L. 1873, ch. 549, sec. 8, before excise commissioners of Delhi, Delaware county, to revoke license issued under L. 1869, ch. 856, sec. 4, after passage of above statute amending L. 1857. Defendant held not to be entitled to trial by jury. "The license was merely a permit given to the relator under which he was authorized to sell ale or beer. It did not give him any property or vested right to enjoy the privileges thereof, beyond the time when the board should become satisfied that he had violated any of the provisions of the acts of 1857, 1869, 1870 or 1873."

Cited,

Peo. ex rel. Connelly v. Murray, 38 N. Y. Supp. 177

Peo. ex rel. Welling v. Meakim, 56 Hun, 626

Peo. ex rel. Funke v. Board of Excise, 24 Hun, 195

People v. Schewe, 29 Hun, 122

In re Bloomingdale, 38 N. Y. Supp. 162

Matter of Lyman v. Erie County Athletic Club, 46 App. Div. 387

Matter of Lyman v. Texter, 59 App. Div. 217

People v. Wynehamer, 20 Barb. 567, *reversed*, 13 N. Y. 378

Prohibitory Act of 1855 held constitutional upon similar reasoning to that in **People v. Berberich**, 20 Barb. 224.

People v. Wynehamer, 13 N. Y. 378, *reversing* 20 Barb. 567

The Prohibitory Act, L. 1855, p. 340, was unconstitutional because it operated upon and destroyed property existing in the hands of citizens when the act took effect.

Intoxicating liquor is property though of a kind which may not be beneficial. All property is equally sacred in view of the constitution.

"However difficult it may be to define with accuracy and precision the line of separation, there is a broad and perfectly intelligible distinction between what is plainly regulation on the one side and what is plainly prohibition on the other."

Cited,

People v. Krushaw, 31 How. Pr. 344

Peo. ex rel. Killeen v. Baird, 11 Hun, 289

People v. Lyon, 27 Hun, 180

Peo. ex rel. Watkins v. Excise Commissioners, 4 Misc. 547

Metropolitan Board of Excise v. Barrie, 34 N. Y. 657

Bertholf v. O'Reilly, 74 N. Y. 509

Leicht v. Board of Excise, 19 N. Y. Supp. 1

Peo. ex rel. Laughran v. Flynn, 48 Misc. 159

People v. Zeiger, 6 Park. Cr. 355

"Lager beer" falls within the term "intoxicating liquors" if the use of it is ordinarily or commonly attended with entire or partial intoxication and whether such is the fact is to be decided by the jury.

Perry v. Edwards, 44 N. Y. 223

In a penalty action, for sale to minor, under L. 1857, the burden is on plaintiff to show defendant knew or had reason to know minority of purchaser.

Perry v. Tynen, 22 Barb. 137

Penalty action by two overseers of town cannot be discontinued by one without consent or concurrence of the other.

Cited,

Board of Excise v. Sackrider, 35 N. Y. 154

Potter v. Deyo, 19 Wend. 361

Whether defendant has a license or not is a matter peculiarly within his knowledge and the burden lay upon him to establish it.

There are many cases where a party is not bound to prove all that he is required to allege in pleading.

Cited,

People v. Bradley, 11 N. Y. Supp. 594

Mayor v. Mason, 4 E. D. S. Rep. 142

People v. Briggs, 114 N. Y. 63

People v. Nyce, 34 Hun, 298

Peo. ex rel. Stevenson Brewing Co. v. Lyman, 67 App. Div. 447

Prussia v. Guenther, 16 Abb. N. C. 230

Where plaintiff alleges his official capacity, court will take judicial notice of his right to sue.

In civil action plaintiff not held to as strict proof as to date of offense as upon trial under indictment. "Sunsmile" which evidence showed was either plain or diluted whiskey.

Lager beer also proven to be intoxicating.

Quain v. Russell, 8 Hun, 319

Civil damage suit held to be maintainable by a wife because her husband became intoxicated and spent his money upon which she relied for support.

Cited,

Quain v. Russell, 12 Hun, 376
Volans v. Owen, 9 Hun, 558
Mead v. Stratton, 87 N. Y. 493
Aldrich v. Sager, 9 Hun, 537
Moriarty v. Bartlett, 34 Hun, 272

Quain v. Russell, 12 Hun, 376

Civil damage suit upon complaint held to be good, 8 Hun, 319. Injury to "means of support" where wife was in destitute circumstances and in want of food and fuel as a result of the debauch and of injuries to her husband who supported the family solely by cultivating a small patch of ground and labor performed for others.

Cited,

Davis v. Standish, 26 Hun, 608

Quinlan v. Conlin, 13 Misc. 568

Injunction will not lie to prevent police interference with sale of soft drinks on Sunday at licensed premises after liquors have been removed. If laws are onerous, relief rests in legislative wisdom and not in judicial discretion. The policy of the State is expressed in the laws made by the representatives of the people and the courts must see that these laws are enforced.

Quinlan v. Welch, 69 Hun, 584, affirmed, 141 N. Y. 158

Posthumous child may recover under Civil Damage Act.

Quinlan v. Welch, 141 N. Y. 158, affirming 69 Hun, 584

Civil Damage Act not a penal statute, but simply creates a cause of action unknown at common law. It is not repealed by Excise Law of 1892, ch. 403, which should be considered as amendatory of Civil Damage Act, so that a cause of action which arose prior to such amendment was not affected. Plaintiff was a posthumous child.

Cited,

Snyder v. Launt, 1 App. Div. 142

Rawlins v. Vidvard, 34 Hun, 205

Civil damage suit where wife was injured in means of support as a result of her husband's intoxication at a hotel owned but not conducted by defendant. Award of jury in excess of actual damages to warrant which no aggravating circumstances were shown. Held, that only a new cause of action was created not a new measure of damages. That "the person against whom exemplary damages are allowed must be connected with and in some way responsible for the aggravating circumstances that authorize the award," e. g., against the owner of premises who leases them to a tenant knowing that he kept a disorderly place, or sold without a license or to minors or habitual drunkards.

Cited,

Reid v. Terwilliger, 116 N. Y. 530
Reid v. Terwilliger, 42 Hun, 310
Ketcham v. Fox, 52 Hun, 284

Reid v. Terwilliger, 42 Hun, 310, *reversed*, 116 N. Y. 530

Civil damage suit. Exemplary damages recoverable against landlord sued jointly with tenant even if not when sued alone.

Cited,

Ketcham v. Fox, 52 Hun, 284

Reid v. Terwilliger, 116 N. Y. 530, *reversing* 42 Hun, 310

Exemplary damages under Civil Damage Act, L. 1873, ch. 646.

Cited,

Lawson v. Eggleston, 28 App. Div. 52

Bacon v. Jacobs, 63 Hun, 51

Wilbur v. Dwyer, 69 Hun, 507

Reinhardt v. Fritzsche, 69 Hun, 565

Civil Damage Act is not a penal statute—L. 1873, ch. 646, not repealed, though modified by L. 1892, ch. 401.

Cited,

Quinlan v. Welch, 69 Hun, 584

Ring v. Gibbs, 26 Wend. 502

Obligor on bond not allowed to object that it does not conform to the statute because broader.

Cited,

Supervisors v. Pindar, 3 Lans. 8

Peo. ex rel. Meakim v. Eckman, 63 Hun, 215

Ripley v. Little, 19 Wkly. Dig. 165

Defendant was sued for penalties due for sales without license. Sales proven to have been made in defendant's building, but complete defense established by proof that for two years defendant's son had been sole owner of the goods and the business and that defendant had no interest in them at the time sales were made.

Ripley v. McCann, 34 Hun, 112

Counsel for appellant strenuously contends that the proof failed to show that the cider sold by the defendant came within the prohibition of the Excise Law. The witness Wilson testified that the cider which he bought of defendant and of which he drank several glasses, intoxicated him. That was enough to bring the case within the rule laid down in the Board of Commissioners of Excise of Tompkins Co. v. Taylor, 21 N. Y. 177, which has been followed in several subsequent decisions. As the cider was shown to have contained enough of the inebriating element, when taken into the human stomach, to produce intoxication, the sale of it in quantities less than five gallons, without a license, rendered the vendor liable under sec. 13 (L.1857). The fact that other witnesses called were not intoxicated by the beverage which they bought of the defendant about the same time is immaterial. There is no evidence that the liquor sold to them was of the same kind and character as that sold to Wilson.

Rollins v. Breed, 54 Hun, 485

Criminal prosecution not a bar to civil action either under Game Law or Excise Law.

Root v. Alexander, 63 Hun, 557, *affirmed*, 142 N. Y. 663

Demand having been made on overseer of poor action was brought by

citizens at expiration of ten days in name of new overseer who had succeeded to the office.

Rouse v. Catskill & N. Y. Steamboat Co., 59 Hun, 80

"Building or premises" defined. Steamboat in navigation is neither, under Civil Damage Act.

Rubenstein v. Kahn, 5 Misc. 408

A license is a personal privilege but the right of sale and transfer subject to the approval of the excise board is given by the Excise Law of 1892 and the purchase price is recoverable.

St. Thomas's Church v. Board of Excise, 20 N. Y. Supp. 831

Construction of Excise Law of 1892 relative to traffic near church. Statute contemplates "principal" entrance to saloon or room not the principal entrance to the building in which it is situated, because statute reads, "between the principal entrances of buildings used for such church or school purposes and the place for which an application for a license has been made."

Sanderson v. Goodrich, 46 Barb. 616

The defendant contracted with the tenant of plaintiff's hotel, leasing the bar and the right to traffic under tenant's license—at the same time giving his note to plaintiff in part payment of rent.

Held, not to be enforceable because illegal.

Secor v. Taylor, 41 Hun, 123

In civil damage suit by an infant child against one from whom the mother had already recovered damages on account of the same wrongful acts, proof that the child has received money from the mother for support is competent but the source of it is immaterial where exemplary damages have not been asked or awarded.

Sharp v. Fancher, 29 Hun, 193

A person bringing a penalty action in the name of overseers of poor under L. 1857 and L. 1873, ch. 820, may be required to give security for costs under Code of Civil Procedure, sec. 3271.

Cited,

Montgomery v. Odell, 73 Hun, 424

Sharpley v. Brown, 43 Hun, 374

Proof of wife's second marriage competent on question as to degree in which she had been injured in her means of support.

Smith v. Joyce, 12 Barb. 21

In a civil action for liquors sold on credit which 1 R. S. 680 prohibits with certain exceptions in favor of licensed tavern keepers between party and party for liquors sold and delivered—the question of plaintiff's license and his right to sell liquors arises collaterally—and a license is to be presumed until some evidence is given to the contrary. In an indictment for sale without license it is the main issue on the part of the defendant; the prosecutor proves the sale and the defendant produces his license, if he has one.

Cited,

People v. Brady, 11 N. Y. Supp. 594

People v. McIntosh, 5 N. Y. Cr. 38

Matter of Lyman v. True Friends Social Circle, N. Y. L. J., Dec. 7, 1897

Smith v. Reynolds, 8 Hun, 128

Civil damage suit. Employer's civil liability for bartender's acts. Proper refusal to "charge the jury that if they found from the evidence that the liquor alleged to have been delivered to deceased was delivered by defendant's bartender without the knowledge of the defendants, and after the defendants had directed him not to sell or give away any liquor to the deceased, then the plaintiff cannot recover as requested by the defendant's counsel."

Cited,

Volans v. Owen, 9 Hun, 558
Mead v. Stratton, 87 N. Y. 493
Austin v. Carswell, 67 Hun, 579
Cullinan v. Burkard, 93 App. Div. 86

Snyder v. Launt, 1 App. Div. 142

After enactment of L. 1892, ch. 403, amendatory and supplementary to Civil Damage Act, it was necessary to give notice not only to licensees but to persons in no-license towns before they could be held liable.

Standart v. Burtis, 46 Hun, 82

Abuse of discretionary power in excise board in settling for a nominal sum a substantial judgment, good and collectible against the party who had sold liquor without license.

Cited,

Olp v. Leddick, 14 N. Y. Supp. 41

Stevens v. Cheney, 36 Hun, 1

To recover damages under Civil Damage Act for injuries to a son of age, a father must either show that the son was poor and dependent on him for support or else that he himself was dependent on the son.

Cited,

Sharpley v. Brown, 43 Hun, 374
DuPuy v. Cook, 90 Hun, 43

Streever v. Birch, 62 Hun, 298

Plaintiff not injured in his property under Civil Damage Act because a boy with whom he was under contract to care for in return for services rendered was frozen to death while intoxicated.

Supervisors v. Pindar, 3 Lans. 8

Liability of county treasurer under his bond. Bond valid though not in strict and technical conformity to statute.

Cited,

Peo. ex rel. Meakim v. Eckman, 63 Hun, 215

Sutter ex rel. Reeve v. Fauble, 25 Hun, 195

In towns where there was no overseer of the poor, citizens could not sue in the name of an excise board whose duty it was to prosecute because sec. 30 of ch. 628, L. 1857, as amended by L. 1873, ch. 820, permitting such suits in place of such overseers was not amended to correspond with the provisions of sec. 22 of ch. 628, L. of 1857, as amended by L. 1873, ch. 820, and L. 1878, ch. 109, providing for excise boards where there were no overseers.

Tanner v. Albion, 5 Hill, 121

Bowling alley kept for hire is a public nuisance at common law.

Cited,

Peo. ex rel. Healey v. Forbes, 52 Hun, 30

Thayer v. Lewis, 4 Den. 269

Suit for penalties. "It should be known who it is that prosecutes the suit, to the end that he may be held answerable as the real plaintiff in the action."

Cited,

Montgomery v. Odell, 73 Hun, 424

Hess v. Appell, 62 How. Pr. 314

Toub v. Schmidt, 60 Hun, 409

"One who is not to be entertained and who has not adopted the inn as a temporary home, is not a guest."

Trustees of Clintonville v. Keeting, 4 Denio, 341

Persons to whom licenses are issued by town officers are protected from penalties inflicted by the Excise Law, but inasmuch as village trustees have power to regulate the sale of liquors, their permission is also required or liability to penalties fixed by them is incurred.

Cited,

Smith v. Joyce, 12 Barb. 21

Turck v. Richmond, 13 Barb. 533

Suit upon promissory note, consideration being liquor sold without license.

Vallance v. Evarts, 3 Barb. 553

Penalty action for sale of liquors. Held, fact of sale could be established by circumstantial evidence.

Vallance v. King, 3 Barb. 548

Penalty under 1 R. S. 680, provisions of which were held not to be repealed by L. 1845, p. 322.

Recovery under charge that defendant was liable if he sold liquor or permitted others to sell it for his benefit, upheld.

Village of Cohoes v. Moran, 25 How. Pr. 385

Village Law imposing penalty for selling liquor on Sunday not in conflict with subsequent general law of 1857 imposing different penalty for selling liquor without license or to be drunk on premises.

Cited,

Village of Gloversville v. Howell, 7 Hun, 345

Village of Cortland v. Howard, 1 App. Div. 131

Complaint in penalty action charging unlawful sale of liquor without charging that the same was without license and in less quantity than five gallons or to be drunk on premises if quantity was greater.

Phrases "unlawful" and "contrary to law" not an averment of all omitted facts necessary to complete a charge, because they are conclusions of law, not of fact.

Cited,

People v. Polhamus, 8 App. Div. 183

Lyman v. Plymouth Social Club, June, 1898, unreported

Village of Deposit v. Devereux, 8 Hun, 317

Provisions of village charter "a special act" relative to disposition of excise moneys not repealed by L. 1874, ch. 444.

Village of Deposit v. Vail, 5 Hun, 310

Penalty action under village charter, L. 1873, ch. 330, for sale of "Mishler's Bitters" before a police justice. Held, that the justice had jurisdiction thereunder and that action was properly brought by village instead of by overseers of poor, pursuant to L. 1873, ch. 820, which did not by implication repeal the former.

Cited,

Village of Gloversville v. Howell, 70 N. Y. 287

Village of Gloversville v. Howell, 7 Hun, 345

Village of Deposit v. Devereux, 8 Hun, 317

Village of Gloversville v. Howell, 7 Hun, 345, affirmed, 70 N. Y. 287

Special excise provisions in charter not repealed by general statute of L. 1874, ch. 444, giving overseers of poor right of action instead of the village; not violative of constitution prohibiting private or local bills having more than one subject, that one being expressed in its title. Local option privileges delegated by legislature to village sustainable.

Cited,

Village of Deposit v. Devereux, 8 Hun, 317

Village of Gloversville v. Howell, 70 N. Y. 287, affirming 7 Hun, 345

L. 1873, ch. 820, does not affect village charter enacted since L. 1857, ch. 628, regarding commencement of penalty actions; nor are latter abrogated by L. 1874, ch. 444.

The charter is not unconstitutional because its title did not refer to excise provisions nor because it authorizes local option, making the operation of the law dependent upon a vote of the people.

Cited,

Peo. ex rel. Watkins v. Excise Commissioners, 4 Misc. 547

Village of Port Richmond v. County of Richmond, 11 App. Div. 217

Diversion of excise moneys under L. 1892, ch. 401, and L. 1892, ch. 404. The county treasurer became custodian and agent for distribution of excise moneys. Where latter uses same for other purposes, the locality entitled to receive same may maintain action against the county.

Cited,

Peo. ex rel. Jones v. N. Y. Homeopathic Hospital, 20 N. Y. Supp. 379

Village of Rome v. Knox, 14 How. Pr. 268

The Act of 1855, being unconstitutional, penalties imposed under previous excise laws are not in force and the traffic in liquor was free as at common law.

A discussion of the reason why people are favorable to or oppose license laws.

Volans v. Owen, 9 Hun, 558, reversed, 74 N. Y. 526

Civil damage suit by father on account of son's intoxication causing him expense and loss of services. Held, that the loss of services which son has been accustomed to render and the necessary charges brought upon him by the son's illness, injured his means of support.

Cited,

Aldrich v. Sager, 9 Hun, 537

Volans v. Owen, 74 N. Y. 526, *reversing* 9 Hun, 558

Liability, etc., under Civil Damage Act not dependent upon the commission of an injury for which by existing laws a remedy by action exists, because a new cause of action is created. Where however injury to means of support is the gravamen of the action, mere diminution of income or loss of property occasioned by son's illness and loss of his services, does not constitute injury to means of support, unless such services were necessary so that the plaintiff's accustomed means of maintenance have been cut off or curtailed.

Cited,

Streever v. Birch, 62 Hun, 298
 McCarty v. Wells, 51 Hun, 171
 Sharpley v. Brown, 43 Hun, 374
 Beers v. Walhizer, 48 Hun, 254
 Reid v. Terwilliger, 42 Hun, 310
 Stevens v. Cheney, 36 Hun, 1
 Moriarty v. Bartlett, 34 Hun, 272
 Hill v. Berry, 75 N. Y. 229
 Mead v. Stratton, 87 N. Y. 493
 Blatz v. Rohrbach, 116 N. Y. 450
 Reid v. Terwilliger, 116 N. Y. 530
 Quinlan v. Welch, 141 N. Y. 158
 Bacon v. Jacobs, 63 Hun, 51
 Reinhardt v. Fritzsche, 69 Hun, 565
 Bennett v. Levi, 19 N. Y. Supp. 226

Wilbur v. Dwyer, 69 Hun, 507

Exemplary damages not allowable upon proof of bare fact that defendant sold liquor which caused or partly caused intoxication, without proof of additional facts.

Cited,

Lawson v. Eggleston, 28 App. Div. 52

Willard v. Rhinehardt, 2 E. D. S. 148

Distinction between boarding house and inn is that in former the guest is under express contract, at a certain rate, for a certain period of time, but in an inn there is no express agreement, the guest being on his way is entertained from day to day according to his business on an implied contract.

Cited,

Cady v. McDowell, 1 Lans. 484

Wood v. City of Brooklyn, 14 Barb. 425

A municipal ordinance prohibiting the sale of liquors on Sunday is void, so far as it relates to sales by innkeepers, who by general statutes (1 R. S. 676, sec. 72) and licenses issued thereunder are permitted to make such sales to lodgers and lawful travelers.

Cited,

Matter of Breslin, 45 Hun, 210
 City of Brooklyn v. Toynbee, 31 Barb. 282
 People v. Toynbee, 20 Barb. 212

Woodhaven Junction Land Co. v. Solly, 148 N. Y. 42

When violation of restrictions against use of premises for liquor traffic insufficient to warrant injunction by vendor.

Wright v. Smith, 13 Barb. 414

Repeal of Act of 1845 by Act of 1847 did not work discontinuance of suits for penalties thereunder or discharge defendants from liability therefor.

Overseers of poor, whose terms of office have expired, may not by stipulation discontinue suits commenced in their name.

Their successors in office assume such suits as their own and become liable for services of the attorney previously retained.

DECISIONS

RELATING TO THE

LIQUOR TAX LAW

First Appellate Department, April, 1896. Reported. 4 App. Div. 185.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. **FRED G. EINSFELD**, APPELLANT, v. **JOSEPH MURRAY** and Others, Commissioners of Excise of the City of New York, Respondents.

Liquor Tax Law of 1896, constitutional—The justice of the law immaterial upon the question of its constitutionality—It is not a tax law, but merely designed to regulate the liquor traffic—An exercise of the police power—A tax need not be uniform, nor the punishment—It does not appropriate public moneys and a two-thirds vote was unnecessary—The classification of cities was not improper—It need not be submitted to mayors of cities for approval.

On March 23, 1896, one Fred G. Einsfeld applied to the commissioners of excise of the city of New York for a license to sell wines and liquors at retail for a period of one year; the application was rejected upon the ground that, under the provisions of chapter 112 of the Laws of 1896, known as the "Liquor Tax Law," the commissioners could not grant a license for a term expiring later than April 30, 1896, and this ground of refusal was stated in substance in the return made to a writ of certiorari obtained by Einsfeld for the purpose of reviewing the determination of the excise commissioners.

Held, that the Liquor Tax Law was constitutional;

That the constitutionality of a law was not to be determined by the fact that the law was unjust, unwise, oppressive or odious;

That the law in question, although denominated "The Liquor Tax Law," was not a tax law, but one, the purpose and intent of which was to regulate the traffic in liquors throughout the State, and to provide for local option;

That the fact that the act was not primarily designed to raise revenue was apparent from this local option feature;

That any taxation under the law was a mere incident to the regulation of the traffic in liquor;

That the regulation of the traffic in liquors was peculiarly within the police power of the State, which was not impaired by the fourteenth amendment to the Constitution of the United States;

That in the regulation of such traffic the Legislature had a right to recognize local differences and needs, and to impose taxes not uniform throughout the State;

That the want of uniformity of punishment for a violation of the penal provisions of the act did not render it unconstitutional, as an offense punishable under a general law might be so punished with more severity in one part of the State than in another, and that an act might constitute a penal offense in one part of the State which was not punishable in another;

That the law did not violate section 20 of article 3 of the State Constitution providing that the assent of two-thirds of the members elected to both branches of the Legislature should be requisite to every bill appropriating public moneys or property for local or private purposes;

That the two-third share of the taxes collected, which by the terms of section 13 of the act belong to the town or city in which the traffic was carried on from which the revenues were received, were not public moneys within the meaning of the Constitution;

That from the beginning the two-thirds of the proceeds of the tax, belonging to the town or city, were kept apart in ownership, and they were not made moneys of the State simply because they were collected by the machinery of the State;

That the act was not unconstitutional because it classified cities in a different way from that contemplated by section 2 of article 12 of the State Constitution, as that section had reference only to laws relating to the property, affairs or government of cities and did not apply to a general law which regulated the liquor traffic throughout the whole State;

That the only provision in the law which could be said to relate to the government of a city, separate and distinct from the general provisions relating to the government of the State, was that which abolished the existing excise commissioners throughout the State, which was a matter of State and not of municipal governmental policy, in which general plan no one city or town had any more interest than any other;

That as the law was not a special city law relating to cities of the first class, and as it did not relate to the government or property or affairs of a particular city, there was no reason why the law should have been submitted to the mayors of the cities of the first class.

APPEAL by the relator, Fred G. Einsfeld, from a judgment of the Supreme Court in favor of the respondents, entered in the office of the clerk of the county of New York on the 26th day of March, 1896, upon the decision of the court rendered after a trial at the New York Special Term, and also from an order entered in said clerk's office on the 26th day of March, 1896, dismissing a writ of certiorari granted on the 24th day of March, 1896.

J. H. Choate, S. Untermeyer, Louis Marshall and Ashbel P. Fitch, for the appellant.

Theodore E. Hancock, Attorney-General, and Julius M. Mayer, for the respondents.

PATTERSON. J.: On the 23d of March, 1896, the relator made application to the respondents, commissioners of excise of the city of New York, for a license to sell wines and liquors at retail in certain designated premises in that city for a period of one year. The commissioners rejected the application and refused to grant the license on the sole ground of the want of power, arising from the passage of an act of the Legislature, approved March 23, 1896, known as "The Liquor Tax Law," under the provisions of which they alleged they could not grant the relator a license for a term expiring later than April 30, 1896. Thereupon application was made to the Supreme Court for a writ of certiorari to review the action of the commissioners, which being granted, the respondents made return setting forth their proceedings, and stating in substance the ground of their refusal, as above mentioned. On the coming in of the return the relator contended before the court that the refusal of the respondents to grant the license applied for was based upon an untenable ground, for the reason that the act approved March 23, 1896 (Chap. 112 of the Laws of 1896) is unconstitutional and void, and, as a consequence, the license laws in operation immediately before its passage remained in force and effect. It was held by the court at Special Term that the act of 1896 is valid, and was passed in conformity with the Constitution of the United States and of the State of New York, and that the writ must be dismissed. From the order and what is called a judgment embodying that decision this appeal is taken.

The subject presented for our consideration on the appeal is that of the constitutionality of the law in question. It has been severely arraigned in argument as offending against justice and reason. It may be as unjust, unwise, oppressive and odious as the relator claims, but all that does not help in the solution of the question before us, and we have no opinion to express on that subject. The final word concerning it has been spoken by the Court of Appeals. In *Bertholf v. O'Reilly* (74 N. Y. 516) it is said: "No law can be pronounced invalid for the reason simply that it violates our notions of justice, is oppressive and unfair in

its operation, or because in the opinion of some or all of the citizens of the State it is not justified by public necessity or designed to promote the public welfare. We repeat, if it violates no constitutional provision it is valid and must be obeyed. The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives according to the methods provided by the Constitution."

Much of the argument against the validity of this law proceeds upon the assumption that it is fundamentally and radically a tax law. That being conceded, many of the contentions of the learned counsel for the relator might prevail. If the sole or the main purpose of the enactment is merely to raise revenue by taxation for State purposes, there are features contained in this bill of inequality and diversity in the imposition of taxes and the infliction of penalties that might well lead to its complete condemnation. Although there is no express provision in the Constitution of the State of New York to that effect, yet it may be that taxes to be valid must be uniform; that were it otherwise, the property of the citizen subjected to the arbitrary imposition of a discriminating tax might be practically confiscated and, therefore, taken without due process of law, or persons of the same class might be deprived of the equal protection of the laws secured by the Constitution of the United States. The power of the State to tax may be limitless in extent, but ought not to be exercised, among those similarly situated, unequally and to the advantage of some and the detriment of others. But these and kindred suggestions seem to have no real place in the discussion connected with the particular enactment now before us. Although by its short title it is called "The Liquor Tax Law," and although it designates the money paid for the privilege of dealing or trading in liquors in quantities of less than five gallons *a tax*, yet the whole scope, purpose and intent of the law is, as its fuller title expresses, "An act in relation to the traffic in liquors and for the taxation and regulation of the same and to provide for local option." The body of the act conforms to the objects stated in the title. A system regulating the traffic in and through the State is created and instituted. It is primarily and essentially an exercise of the police power of the State over a particular trade or business which from early times has been made the subject of State legislation, the general history and

drift of which may be found, by those interested in the matter, in the opinion of Judge WRIGHT in the important case of *The Metropolitan Board of Excise v. Barrie* (34 N. Y. 657). That such excise legislation is peculiarly within the police power is recognized by all courts of authority and it would seem no longer open to dispute. (See the authorities collected in note, 11 Am & Eng. Ency. of Law, 583.)

The fourteenth amendment to the Constitution of the United States does not impair the police power of the State. (*Mugler v. Kansas*, 123 U. S. 623; *Powell v. Pennsylvania*, 127 id. 678; *Barbier v. Connolly*, 113 id. 27.)

It is within the competency of the State to interdict all traffic in liquors within its boundaries. That is admitted. The Legislature having such an extreme power may exercise the lesser one of regulating the traffic. It may make such regulations and put such trammels upon the traffic as seem to be expedient or necessary to the safety, the welfare or the protection of the people. (*Bertholf v. O'Reilly*, *supra*.) In undertaking to do so by the enactment of a general law, which shall control the whole traffic in each and every part of the State, it may recognize local differences and needs, and make special provision therefor. If diversity arises therefrom in the application to particular localities of any of the incidents of the law, the Legislature is not incompetent to authorize that diversity. It is part of the general scheme. It arises from the necessity of treating local conditions and situations as they are found, and from the recognition of patent facts, such as that there are striking differences between the retail traffic in liquor in a great metropolis and in a remote rural neighborhood, or even in separate parts of the same municipality, and that disproportion must of necessity be allowed in the impost exacted for the privilege of engaging in such traffic in each of such places. All such provisions come within the one general act as parts of one general excise system and the regulation thereof.

That the purpose of the act is not primarily to raise revenue from taxation is apparent from other considerations. Leaving out of the discussion altogether the pertinent question whether such taxes as those imposed by the act under consideration are in reality anything more than license fees, and confining ourselves to what is deducible from the structure and provisions of the act itself, we find that a third and conspicuous and all-important

matter is provided for, and that is the local option feature, which plays so prominent a part in the legislation that it is made one of the cardinal elements proclaimed in the title of the act. The system created and established by this act is by the express terms thereof made to supersede and take the place of all prior existing excise laws or systems throughout the whole State. It establishes an entirely new system, bringing under State control that which was theretofore under local, municipal or community jurisdictions and administrations. The right to traffic in liquor is not limited to individuals, except so far as certain disqualifications are designated in the act; but no one is permitted to sell at retail or deal in liquor in less than certain quantities without State permission first obtained, to be evidenced by the possession of a certificate which takes the place of a license, and for which dues called taxes are to be paid. Taxation is but an incident, but one and that not the chief, although a necessary element of the legislation. Regulation of the traffic is the fundamental purpose of the law. The taxes are not levied upon persons nor upon property, for a license is not property except in a qualified sense, and as it is made so by the terms or operation of a statute, and the taxes are, and are declared to be, "*excise taxes upon the business of trafficking in liquors*," and hence a mere incident to the regulation of that business. It is all within the police power of the State, exercised for the supposed general welfare, and the power to regulate must of necessity include the power to license or tax. Nor does the want of uniformity of punishment for the violation of the penal provisions of the act render it unconstitutional. The same offense, punishable under a general law, may be so punished with more severity in one part of the State than in another. (*Williams v. The People*, 24 N. Y. 405; *Matter of Bayard*, 25 Hun, 546), and that may constitute a penal offense in one part of the State that is not punishable in another. (*People v. Havnor*, 1 App. Div. 459; *affd.*, 149 N. Y. 196.)

Regarding, as we do, this act as one constituting inherently and essentially an exercise of the police power of the State, we are brought to the consideration of the particular objections taken to it as violating the provisions of the Constitution of the State of New York.

First. The position is taken by the relator that the law is unconstitutional, because it violates section 20 of article 3 of the Constitution of the State, which provides that the assent of two-

thirds of the members elected to both branches of the Legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes. The act of 1896 was passed by a three-fifths vote only.

In section 13 of the act it is provided that all taxes, fines and penalties (except those imposed upon or gathered from the traffic in liquors on railroad cars, steamboats, etc.), under the act "in counties containing a city of the first class shall be collected by and paid to the special deputy commissioner for such county, and in all other counties to the county treasurer of the county in which the traffic is carried on," and "one-third of the revenue resulting from taxes, fines and penalties under the provisions of this act, less the amount allowed for collecting the same, shall be paid by the county treasurer, and by the several special deputy commissioners, within ten days from the receipt thereof, to the treasurer of the State of New York, to the credit of the general fund, as a part of the general tax revenue of the State, and shall be appropriated to the payment of the current general expenses of the State, and the remaining two-thirds thereof, less the amount allowed for collecting the same, *shall belong* to the town or city in which the traffic was carried on from which the revenues were received, and shall be paid by the county treasurer of such county and by the special deputy commissioners to the supervisor of such town, or to the treasurer or fiscal officer of such city, and such revenues shall be appropriated and expended by such town or city in such manner as is now, or may hereafter be, provided by law." The real question in connection with this contention of the relator is, whether the two-thirds of the product mentioned above is public money within the meaning of the Constitution. We think clearly it is not. The public moneys and property therein mentioned and referred to are those belonging to the State. Prohibited appropriation is of such moneys only. In *The Board of Supervisors v. Allen* (99 N. Y. 532) it was claimed that chapter 213 of the Laws of 1879, relating to certain county treasurers and their compensation, was unconstitutional, because it appropriated public moneys for local purposes; but it was held that the act did not apply, because the appropriation was not of State moneys. The accuracy of the definition of "public money," as that belonging to the State, can scarcely be doubted. It seems to us indisputable that the two-thirds of the

net proceeds of the taxes, fines and penalties referred to in the 13th section of the act under consideration cannot be regarded in any sense as State moneys. They are not so designated in the act. On the contrary, they are expressly and specifically declared to "*belong* to the town or city in which the traffic was carried on." The anterior rights of localities as theretofore existing were done away with. The act, with regard to the two-thirds of the revenue, simply recognizes that there were such rights, and professes to provide anew for them with some measure of justice. It thus declares that some part, at least, of that which the localities had been accustomed to receive directly, shall come to them and be theirs. That is not an appropriation of the moneys of the State, but a devotion to the component parts of the State of what was esteemed to be their just shares of the product of a particular revenue. At no period of time do the two-thirds belong to the State. From the beginning they are separated, and the State share and the share of the town or city are kept apart in ownership. There seemed to have been scrupulous care taken in constituting and maintaining that separate ownership. The two-thirds part does not become money of the State simply because the State's agent collects it through, and by means of, the State machinery. The mere method of the collection or realization of the amounts of the taxes, fines and penalties cannot govern the matter, and, hence, we conclude that the two-thirds referred to, not being State money, the constitutional provision does not apply.

Second. It is further objected by the relator that the act under consideration classifies cities in a different way than the Constitution does, and that for that reason it violates section 2 of article 12 of the Constitution. This objection proceeds, we think, upon a misapprehension of the object of that section. The circumstances which led up to the adoption of it are well known. It had not been unusual for laws to be passed seriously affecting the local interests and property of cities without notice to the authorities of such cities, and without any opportunity for them or the inhabitants to be heard upon the subject. That had grown to be a great crying evil, and the provision of the Constitution was intended to remedy it. But it must be noticed that the classification has reference only to laws relating to the property, affairs or government of cities, and it is only with reference to that kind of laws that the classification is effectual

or material. The act of 1896, in question, is not one that can be said to relate to either of those things. As we have before stated, it is a general law in the fullest sense of that word, having regard to the regulation of the liquor traffic throughout the whole State, and contains such particular provisions with reference to special localities as the conditions of those localities seem to require. In no sense does it relate to the property, affairs or government of the city. It is purely a matter of State government, and is a general law upon that subject, and is not, as we think, at all within the provisions of the Constitution. A provision in a general law can not be said to be a special city law simply because it makes some provision with regard to the inhabitants of the city different from that established for other portions of the State, unless it contains something relating to the government of the city separate and distinct from the general provision relating to the government of the State. This law contains no such provision. The nearest approach to one is that it abolishes the existing excise commissioners; but that abolition results from the total extinction of an entire excise system and the creation of another and different one — one including the whole State and embracing in a single scheme everything necessary to the establishment and operation of a complete system, even to the varying details required by different conditions in different localities. Every existing excise board or commission throughout the whole State is abolished. It is no more a special city law because it abolishes the office of excise commissioner of the city of New York than would be a law abolishing the office of coroner. No one city or town is interested in the general plan more than any other. It is a matter of State, and not of municipal, governmental policy, and it could never have been contemplated that the voice of cities or municipal bodies, as such, should be made potential in legislation of a general character applying to the State as a whole, and not specifically or exclusively affecting the interests, property or internal government affairs of a municipality.

Third. The further contention is made that the law should have been submitted to the mayors of cities of the first class as provided by the section of the Constitution above referred to. Much of what we have said with reference to the objection last considered applies equally to this, and it is unnecessary to repeat it. The law is not a special city law as to cities of the first class; it does not relate to the government, property or affairs of a

particular city, and was not such a measure as, under the Constitution, should have been submitted in the manner claimed by the relator's counsel.

The order and final adjudication appealed from must be affirmed, with costs.

VAN BRUNT, P. J., BARRETT, RUMSEY and WILLIAMS, JJ., concurred.

Order and final adjudication affirmed with costs.

Supreme Court, New York Special Term, April, 1896. Reported. 17 Misc. 1.

THE PEOPLE ex rel. BENJAMIN BASSETT v. THE WARDEN OF THE
CITY PRISON.

Excise—Liquor Tax Law—Free lunch.

Section 31 of chapter 112, Laws of 1896, known as the Liquor Tax Law, prohibiting the sale of liquor in certain cases, and the giving away of food to be eaten on the premises, took effect immediately, and is operative as to persons holding licenses under the old Excise Law.

HABEAS CORPUS.

Samuel Untermeyer, for relator.

John F. McIntyre, for respondent.

BEEKMAN, J. The relator seeks to be discharged on *habeas corpus* from imprisonment under a commitment made by a city magistrate for a violation of subdivision "E" of section 31 of chapter 112 of the Laws of 1896, commonly called the Raines law, on the ground that he gave away food to be eaten on certain premises where liquor was sold. The relator has demurred to the return, and challenges the validity of the commitment on the ground that the section in question, at the time of the alleged offense, was not operative in respect to persons holding licenses under the old Excise Law, within which class it is admitted that the relator comes. If, therefore, the construction of the law for which he contends is sound, it must follow that the commitment is void, and that he should be discharged from arrest.

The act in question was, undoubtedly, intended to be a complete embodiment of the policy of the State in respect to the regulation of the liquor traffic, and to express all of the condi-

tions which the legislature considered necessary or desirable by way of limitation in order to safeguard the public interests. The enactment rests for its validity upon the police power of the State which the courts of this State have sustained in its relation to this traffic, to the extent even of absolute prohibition. (*Wynehamer v. People*, 13 N. Y. 378; *Bertholf v. O'Reilly*, 74 id. 509-20.) Having the power to prohibit, the legislature may impose any conditions it sees fit upon its exercise, and is the sole judge of the reasonableness of any restriction which it may deem proper to impose. Whether, therefore, the prohibition against the giving away of food where liquor is sold is reasonable or not does not come within the field of judicial inquiry. The difficulty in determining whether this particular prohibition is operative in respect to the class of licensees to which the relator belongs grows out of what seem to be, upon their face, contradictory or inconsistent provisions of the statute. Section 31 provides as follows: "It shall not be lawful for any corporation, association, copartnership or person which, or who, has not paid a tax as provided in section 11 of this act, and obtained and posted the liquor tax certificate, as provided in this act, to sell, offer or expose for sale, or give away liquors * * * in any quantity whatever, any part of which is to be drunk on the premises of such vendor, or in any outbuilding, booth, yard or garden appertaining thereto or connected therewith. It shall not be lawful for any corporation, association, copartnership or person, whether having paid such tax or not, to sell, offer or expose for sale or give away any liquor: A. On Sunday * * * or E. To sell or expose for sale, or have on the premises where liquor is sold, any liquor which is adulterated with any deleterious drug, substance or liquid which is poisonous or injurious to health; or to give away any food to be eaten on such premises."

Taking this section by itself, the meaning is perfectly plain. The traffic in liquor is absolutely prohibited to all persons who have not paid the tax and obtained the certificate for which section 11 provides; and even then certain restrictions are imposed, limiting the business in respect to time, place and manner, which are intended to be unconditioned in their operation. The prohibition is absolute in terms, and would have been sufficient without the assertion "whether having paid such tax or not," a phrase which was evidently employed to give special emphasis to the expression of a purpose that under no circumstances should

the giving away of food be associated with the sale of liquor in the same place. As section 45 provides that this act shall take effect immediately, there would, of course, be no difficulty in holding that this prohibition was immediately operative, and had been violated by the relator, were it not for certain other provisions of the statute, which will presently be referred to.

In enacting a law which was intended to put into operation an entirely new system, the legislature was confronted with the fact that an enormous traffic in liquor existed in the State, authorized by licenses granted by commissioners of excise under the authority of and subject to restrictions and regulations contained in existing statutes. The new system demanded the appointment and qualification of a large number of new officers, and the organization of their work before the tax could be received and the certificate issued, which was essential to legalize the traffic. It was necessary, therefore, that the act should go into effect immediately, so far, at least, as the administrative portions of it were concerned. At the same time it was also evident that considerable time would have to elapse before the organization would be complete, and that unless some temporary provision should be made for the continuance of the traffic, the whole business would be abruptly suspended to the ruin of thousands engaged in it, and the inconvenience and privation of a large proportion of the people. Furthermore, justice demanded that a reasonable time should be afforded to those whose fortunes were embarked in the trade to prepare for the impending change in the conditions under which it could be conducted, and to take such steps as prudence might suggest to minimize inevitable loss. Under the influence, doubtless, of these considerations, the following provisions were inserted in the law:

By section three it is provided that from and after the 30th day of April, 1896, all boards of excise in the State are abolished, and that the rights, duties and powers of all boards of excise, and of all commissioners of excise, and of the clerks and all other employees shall cease and terminate from that date; also that no licenses to sell liquor should be granted, after the passage of the act, by any such board of excise to extend beyond the 30th day of April, 1896, and that the fee for such license to so expire shall be in proportion to the fee for one year. Section four provides as follows: "Every license heretofore lawfully granted by a board of excise which is valid when this act takes effect,

shall be and remain valid for the term for which it was granted, except as herein provided, unless sooner canceled under the provisions of the law under which it was granted, and the rights and liabilities of the holder thereof during such term shall be governed by the laws in force immediately prior to the taking effect of this act, except as otherwise expressly provided in this act, but such license shall cease, determine and be void from and after the 30th day of June, 1896; and the tax herein provided to be assessed shall not be levied or collected upon the business of any corporation, association, copartnership or person holding an unexpired license until the time lawfully fixed for the expiration of such license, or its termination as herein provided unless such license be sooner canceled."

In a subsequent section the powers and duties of boards of excise in respect to the prosecution of violations of pre-existing laws and the transfer, surrender and revocation of licenses are vested in the special deputy commissioners to be appointed under the act for the period intervening between the 30th day of April, 1896, when such boards are abolished, and the 30th day of June, 1896, when all licenses are terminated.

The prohibition, therefore, which the first paragraph of section 31 contains, forbidding any traffic in liquor without previous payment of the tax for which the statute provides, is necessarily subject to these special provisions, which in continuing existing licenses and authorizing new ones to be issued up to the 30th day of April, 1896, sanction the traffic under the old system until the license has terminated as provided in the act. Until that time arrives, the holder of a license transacts the business which it authorizes pursuant to the laws in force at the time of the passage of the act in question, and "his rights and liabilities," in respect thereto, are governed by such laws. While the words "rights and liabilities" seem to express, in a general way, all the privileges which the licensee enjoyed, and every penalty to which he was subject, under those laws, the important qualification is added "except as otherwise expressly provided in this act."

It is here that the divergence of views logically commences in respect to the scope of the prohibitory regulations contained in section 31, which forbids, among other things, the giving away of food on premises where liquor is sold. It is claimed, on behalf of the relator, that no such restriction or prohibition existed in the former laws; that the holder of a license at the time the new

law was passed enjoyed the right to do the act thus prohibited, and that until his license is terminated he is, therefore, authorized to continue to do so by force of the guaranty above referred to. It is also claimed that the clause "except as otherwise expressly provided by this act" refers to the change of jurisdiction from boards of excise to special deputy commissioners of excise, who, by section 9, are to exercise the powers and perform the duties of the former in respect to the transfer, surrender or revocation of any license, and the prosecution of offenses for violations of law under any law existing immediately prior to the passage of the act.

But this construction is altogether too narrow, and arbitrarily puts a limit upon the operation of an exception which, I think, was intended to cover all provisions of the statute which are inconsistent with or vary from pre-existing law, and which, under the system, are susceptible of immediate enforcement without disturbance of the general plan of the statute. In fact, in no other way can due effect be given to the mandate that the act shall take effect immediately. This view is strongly reinforced by section 44 of the act, which provides as follows:

"§ 44. Laws, grants and charters repealed; saving clause.—The provisions of any special or local law, grant or charter in conflict with this act are hereby repealed and annulled. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is repealed, but the provisions of any such relating to the transfer, cancellation or revocation of a license, the collection of penalties or prosecutions for the violation of the law, shall continue in force as to any license which has not expired at the time this act takes effect, until the expiration thereof, subject to the provisions of this act in relation to the performance of the duties of boards of excise or excise commissioners by special deputies or special agents designated by the State Commissioner of Excise. The repeal of any law by this act shall not revive a law repealed thereby, but such repeal shall not impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time this act takes effect, under or by virtue of any law so repealed, and the same may be asserted, enforced, prosecuted or inflicted as fully, and to the same extent, as if such law had not been repealed. All actions and proceedings, civil or criminal, commenced under or by virtue of a law so repealed, and pending immediately prior

to the taking effect of this act, may be prosecuted and defended to final effect in the same manner as they might have been under the laws then existing, subject to the provisions of this act authorizing special deputy commissioners or special agents designated by the State Commissioner of Excise to perform the duties of boards of excise."

The schedule referred to in the section includes, and thus apparently repeals, the entire law under which the liquor traffic was conducted and regulated before the passage of the act, with the following exceptions: 1. The provisions relating to the transfer, cancellation or revocation of a license. 2. The collection of penalties or prosecutions for the violation of the law, in respect to any license which had not expired, until the expiration thereof. Taken in connection with the provisions of sections 3 and 4 of the act, which recognize the continuance of such licenses after the passage of the act and which declare that "the rights and liabilities" of the holder of such licenses, during such term, "shall be governed by the laws in force immediately prior to the taking effect of this act, except as otherwise expressly provided in this act," it must be confessed that the saving clause of the repealing section is unfortunately narrow and most inartificially expressed. It is, however, in this condition, a very strong indication of an intention that the sanction given by section 4 to the continued traffic, under licenses issued under the old law, is not to be extended beyond what the necessities of the case may reasonably require.

Under the former law the license expressed the class of traffic which the licensee was permitted to carry on, and, while prohibitory regulations, in many respects similar to those which are embraced in section 31 of the present act, are there found, they are appropriately stated as regulations of an already licensed traffic. The rights, then, which are reserved to existing licensees under the present law are those which are conferred in and by the license, to be exercised according to the license, and also the *quasi* property attributes with which the statute has to some extent invested the license itself in respect to its transfer; while the liabilities under the old law which are continued are those which are immediately associated with misconduct in respect to that which has thus been reserved, or which has not been obviously replaced by some express provision of the later law. The saving of rights under the license does not necessarily include freedom

therefore, a violation of one of the provisions of the Liquor Tax Law.

It now remains to be considered how shall the defendant be tried; that is, as heretofore, in the Court of Special Sessions, with or without a petit jury, or in a manner set forth in section 35 of the Liquor Tax Act—to wit, by examination before the committing magistrate. I think by the latter method. To be sure, section 4 of the Liquor Tax Law says, among other things: “The rights and liabilities of the holder thereof (that is, of the license now in force under the old law) during the term of such license shall be governed by the laws in force immediately prior to the taking effect of this Liquor Tax Act, except as otherwise expressly provided in the act.”

I hold that this applies exclusively to his rights and liabilities so far as affected by the old License Law; and does not mean that, if such licensee violates any provision of the present act, redress for such violation must be governed by the old Excise Law under which he is a licensee, but that redress for the violation of the above-mentioned or any provision of the Liquor Tax Act by the licensee under the old Excise Law must be had after the manner set forth in section 35 of the said Liquor Tax Act—to wit, by examination of the defendant, and the finding or not finding of sufficient cause to believe the person or persons charged with such crime guilty thereof.

Court of Appeals. Reported. 149 N. Y. 367.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. FRED G. EINSFELD, Appellant, v. JOSEPH MURRAY et al., Commissioners of Excise of the City of New York, Respondents.

- 1. Constitutionality of the Liquor Tax Law of 1896—Appropriation of excise moneys to localities—Not a two-thirds bill—Constitution, Art. III, § 20.**

The provision of the Liquor Tax Law of 1896 (Chap. 112, § 13), which declares that two-thirds of the excise taxes collected thereunder shall belong to the town or city in which the traffic was carried on from which the revenues were received, is in accordance with an uninterrupted understanding that the legislature may devote excise moneys to the uses of the localities in which they are collected, by majority bill, and did not render the bill for the law subject to the requirement of the Constitution

(Art. III, § 20) that "the assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes."

2. Not a "Tax Law."

Chapter 112 of the Laws of 1896, known as the Liquor Tax Law, is not a "tax law," in the proper sense, as it does not have for its primary purpose the raising of revenue for the support of the government; but it is a law enacted under the police power, the exactions of which, although denominated taxes, are imposed for the primary purpose of regulating and controlling the liquor traffic.

3. Not a "City Law"—Classification of cities—Constitution, Art. XII, § 2.

The Liquor Tax Law of 1896, being a general State excise law, with such special provisions and adaptations to localities as to the Legislature seemed proper, is neither a general or special "city law," nor does it relate to the "property, affairs or government of cities," within the meaning of the Constitution (Art. XII, § 2), and hence is not invalidated by the fact that, in fixing the excise taxes upon the business of trafficking in liquors, it (§ 11) graduates them in cities according to population, not following the classification of cities fixed by the Constitution.

4. Bill not submitted to mayors of cities—Constitution, Art. XII, § 2.

The Liquor Tax Law of 1896, not being a "special city law," within the meaning of the Constitution (Art. XII, § 2), the bill therefor was not required to be submitted to the mayors of the cities affected thereby, before its final enactment.

People ex rel. Einsfeld v. Murray, 4 App. Div. 185, affirmed.

(Argued April 30, 1896; decided May 26, 1896.)

APPEAL from judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 25, 1896, which affirmed a judgment entered upon a decision of the court at Special Term, dismissing a writ of certiorari brought by the relator to review the action of the board of excise of the city of New York in refusing to grant his application for a license to sell strong and spirituous liquors upon the sole ground that by the terms of the Liquor Tax Law (Chap. 112, Laws of 1896) there was no power in the board to issue a license for a term expiring later than April 30, 1896.

Joseph H. Choate, Samuel Untermeyer, Louis Marshall and Ashbel P. Fitch for appellant. The act under consideration is a taxing law, as distinguished from an act licensing the liquor traffic. (*Adler v. Whitbeck*, 44 Ohio St. 539; *Anderson v. Brewster*, 44 Ohio St. 570; *Youngblood v. Sexton*, 32 Mich. 460;

Cooley on Taxation, chap. 18.) Whether the act be regarded as creating a tax or a license, it is unconstitutional, because it was passed in violation of article 3, section 20, of the State Constitution, which declares that "the assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes." (Laws of 1896, chap. 112, §§ 40, 44; *People ex rel. v. Comrs. of Highways*, 54 N. Y. 276; *Trustecs of Exempt Firemen's Fund v. Roome*, 93 N. Y. 329; *Rumsey v. N. Y. & N. E. R. R. Co.*, 130 N. Y. 88; *People ex rel. Adsit v. Allen*, 42 N. Y. 378; *State v. Bordelon*, 6 La. Ann. 68; *State v. Steele*, 37 La. Ann. 353; *McCauley v. Brooks*, 16 Cal. 11; *Carr v. State*, 127 Ind. 204; *Restine v. State*, 20 Ind. 328; *Campbell v. Comrs.*, 115 Ind. 591.) The act is also unconstitutional, because section 11, which fixes the excise taxes upon the business of trafficking in liquors, creates a classification of cities at variance with that created by article XII, section 2 of the State Constitution, and seeks to legislate with respect to cities of the State on the basis of such unconstitutional classification. (Const. of 1846, art. 3, § 18; *In re N. Y. E. R. R. Co.*, 70 N. Y. 327; *Treanor v. Eichhorn*, 74 Hun, 58; *In re Church*, 92 N. Y. 1; *In re East River Bridge Co.*, 75 Hun, 122; *People ex rel. v. Bd. Suprs.*, 174 N. Y. 1; *W. Nat. Bank v. Cheney*, 94 Ill. 430; *Ayers' Appeal*, 122 Penn. St. 266; *State ex rel. v. Hammer*, 42 N. J. L. 435; *Anderson v. City of Trenton*, 42 N. J. L. 486; *Goldberg v. Dorland*, 56 N. J. L. 364; *Alexander v. City of Elizabeth*, 56 N. J. L. 71.) The act is likewise unconstitutional because it has not been submitted to the several cities affected by its provisions as required by the cities article. (Const. of N. Y. art. 12, § 2; *Satterlee v. Camden*, 41 N. J. L. 405; *People v. C. P. R. Co.*, 83 Cal. 393; *City of Pasadena v. Stimson*, 91 Cal. 239; *Desmond v. Dunn*, 55 Cal. 242; *State v. Anderson*, 44 Ohio St. 247.) The act is likewise unconstitutional, because it is a tax law, and imposes upon different individuals engaged in the same class of traffic taxation which is not uniform throughout the State, and makes such taxes a lien on the property of the person carrying on the traffic. It thus not only operates as a taking of property without due process of law, but it abridges the privileges and immunities of citizens of the United States within the meaning of both the State and Federal Constitutions. (*Exchange Bank v. Hines*, 3 Ohio St. 1; *Township of Pine Grove v. Tallcott*, 19 Wall. 675;

United States v. Singer, 15 Wall. 111-121; *Head Money Cases*, 112 U. S. 580; *Pollock v. F. L. & T. Co.*, 157 U. S. 592; *Senior v. Ratterman*, 44 Ohio St. 661; *People ex rel. v. Albertson*, 55 N. Y. 50; *Cooley on Const. Lim.* [6th ed.] 206; *Curtis v. Whipple*, 24 Wis. 356; *Tyson v. School Directors*, 51 Penn. St. 9; *Freeland v. Hastings*, 10 Allen, 570; 58 Maine, 590; *Lowell v. Boston*, 111 Mass. 454.) The act is unconstitutional, because by section 23 it prohibits persons from trafficking in liquors who are non-residents of the State of New York, and likewise prohibits any co-partnership from trafficking, unless one or more members owning at least one-half interest in the business are residents of the State. (*Walling v. Michigan*, 116 U. S. 446.)

T. E. Hancock, Attorney-General, for respondents. The act did not require the assent of two-thirds of the members of the legislature, and was not a bill appropriating public moneys or property for local or private purposes. (Const. N. Y. art. 3, § 20; *Metr. Board of Excise v. Barrie*, 34 N. Y. 662; *People ex rel. v. Dayton*, 55 N. Y. 367; *Fort v. Burch*, 6 Barb. 73; *People v. Quigg*, 59 N. Y. 86; *Power v. Village of Athens*, 99 N. Y. 602; *People ex rel. Presmeyer v. Comrs. of Police*, 59 N. Y. 96; *Bertholf v. O'Reilly*, 74 N. Y. 509-526; *In re McPherson*, 104 N. Y. 306; Laws of 1880, chap. 233; *Bd of Suprs. v. Allen*, 99 N. Y. 532; *People v. Alden*, 112 N. Y. 121.) The act in question is an assertion of the ordinary police power of the State, and in no manner conflicts with the Constitution of the United States. (*License Cases*, 5 How. [U. S.] 504; *Bartmyer v. Iowa*, 18 Wall. 129; *Mugler v. Kansas*, 123 U. S. 627; *Cooley on Const. Lim.* [6th ed.] 716; *In re Hoover*, 30 Fed. Rep. 51; *Walton v. State*, 62 Ark. 197; *Crowley v. Christensen*, 137 U. S. 86; *Bertholf v. O'Reilly*, 74 N. Y. 509; *Metr. Board of Excise v. Barrie*, 34 N. Y. 657-667; *Block v. Jacksonville*, 36 Ill. 301; *Commonwealth v. Brennan*, 103 Mass. 70; *Calder v. Kurby*, 5 Gray, 507.) It was not necessary to submit the bill to the cities of the State for their approval or acceptance. (*Metr. Bd. of Excise v. Barrie*, 34 N. Y. 657; *Sedgwick on Stat Const.* [2d ed.] 409; *People ex rel. v. Briggs*, 50 N. Y. 553, 558; *People ex rel. v. Comstock*, 78 N. Y. 356; *Gordon v. Cornes*, 47 N. Y. 608, 616, 617; *Cooley on Const. Lim.* 210, 211; *Sage v. City of Brooklyn*, 89 N. Y. 189; *People ex rel. v. McClave*, 99 N. Y. 83.)

Julius M. Mayer for respondents. The statute is a licensing law. It is an exercise of the police power of the State. It permits the conduct of a traffic which, without such permission, it declares unlawful. It taxes the privilege of trafficking in liquor, and does not tax the liquor itself. It does not tax property. The excise taxes need not be uniform. (*Leavenworth v. Booth*, 15 Kans. 627; *State v. Hipp*, 38 Ohio St. 199; *Butzman v. Whitbeck*, 42 Ohio St. 223; *King v. Cappellar*, 42 Ohio St. 218; *State v. Sinks*, 42 Ohio St. 345; *Pleuler v. State*, 11 Neb. 547; *Youngblood v. Sexton*, 32 Mich. 419; *Adler v. Whitbeck*, 44 Ohio St. 657; *Metr. Bd. of Excise v. Barrie*, 34 N. Y. 657; Laws of 1892, chap. 399; Laws of 1896, chaps. 112, 327; *In re McPherson*, 104 N. Y. 316.) The classification in the bill is not repugnant to the Constitution. It was not necessary to submit the bill to the mayors of the cities of the first class. (*In re N. Y. El. R. R. Co.*, 70 N. Y. 327; *In re Church*, 92 N. Y. 1; *Tonnele v. Hall*, 4 N. Y. 140; *District Township v. Dubuque*, 7 Clark [Iowa], 262; *People v. Harnor*, 149 N. Y. 196; *Williams v. People*, 24 N. Y. 405; *In re Bayard*, 25 Hun, 546; *Weil v. Calhoun*, 25 Fed. Rep. 865; *State v. Parker*, 26 Vt. 357; *Vil. of Gloversville v. Howell*, 70 N. Y. 287.) Two-thirds of the excise taxes to be collected under the act are not public moneys of the State, and the provisions of section 13 are not in contravention of article 3, section 20, of the Constitution. (*Ristine v. Indiana*, 20 Ind. 338; *State v. Bordelon*, 6 La. Ann. 69; *Carr v. State*, 127 Ind. 204; *Campbell v. Board of Comrs.*, 115 Ind. 591; *McCauley v. Brooks*, 16 Cal. 11.) Every presumption is in favor of a statute, and to justify the court in pronouncing it an unauthorized expression of the legislative will it must be made to appear that, when fairly and reasonably construed, it is in clear and substantial conflict with some provision of the Constitution. If the act and the Constitution can reasonably be so construed as to enable both to stand, it is the duty of the court to give them that construction. (*Sweet v. City of Syracuse*, 129 N. Y. 316.)

ANDREWS, Ch. J. The sole question involved in this appeal is the constitutionality of the act of the legislature, approved March 23, 1896, entitled "An act in relation to the traffic in liquors and for the taxation and regulation of the same and to provide for local option." The constitutionality of the act is assailed on three principal grounds: (1) That it appropriates

the public moneys or property of the State to private and local purposes, and not having been passed by a two-thirds vote of the legislature, is void under art. 3, sec. 20 of the State Constitution; (2) that section 11 of the act, which fixes the excise tax upon the business of trafficking in liquors, creates a classification of cities at variance with that created by art. 12, sec. 2 of the Constitution; (3) that the act is a special city law as to each of the cities of the State, which, under art. 12, sec. 2 of the Constitution, was required to be submitted to the mayor for acceptance or rejection before final enactment. These questions are considered in the opinion of the Appellate Division of the First Department in the decision from which the appeal is taken. We concur in the conclusion reached, and can add but little to the very cogent and satisfactory opinion of Judge PATTERSON in the case. We shall, however, in view of the great public interest in the subject, make some observations upon the several questions in the order in which they have been stated.

First. Art. 3, sec. 20, of the Constitution prescribes: "The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes." It is insisted that section 13 of the act of 1896, which provides that one-third of the revenues derived under the act, less the amount allowed for collecting the same, shall be paid to the treasurer of the State to the credit of the general fund as a part of the general tax revenue of the State, and that the "remaining two-thirds thereof, less the amount allowed for collecting the same, shall belong to the town or city in which the traffic was carried on from which the revenues were received, and shall be paid by the county treasurer of such county and by the special deputy commissioners to the supervisor of such town or to the treasurer or fiscal officer of such city; and such revenues shall be appropriated and expended by such town or city in such manner as is now or may hereafter be provided by law for the appropriation and expenditure of sums received for excise licenses, or in such other manner as may hereafter be provided by law," is in contravention of this section of the Constitution as respects the disposition made by the act of two-thirds of the revenue to town and city purposes. This latter clause, it is insisted, is an appropriation of public money to local purposes within this section of the Constitution, and it being conceded that the act did not

receive a two-thirds vote of the members of the legislature, if the claim is well founded, the 13th section of the act, so far as relates to two-thirds of the revenues, is unconstitutional and void.

The appropriation of this part of the excise tax revenues is without doubt for a local purpose within article 3, section 20 of the Constitution. The fact that the purpose for which an appropriation is made is public does not withdraw it from the inhibition of the section if the purpose is also local. An act may be local although public. (CHURCH, Ch. J., *Kerrigan v. Force*, 68 N. Y. 381; *People v. Allen*, 42 id. 378.) The crucial question, therefore, is whether the act of 1896 is, within the section, an appropriation of public moneys. This provision of the present Constitution was in the Constitution of 1821, and has ever since formed a part of the organic law of the State. Section 13 of the act of 1896, after fixing the rule of distribution of the excise taxes as between the State and the cities and towns, prescribes that the revenues received by the cities and towns shall be appropriated and expended for the purposes to which the excise moneys are applied under existing laws. The Excise Law of 1892, which was in force up to the passage of the act of 1896 under which all excise moneys were paid over to the several towns or cities in which licenses were granted and in which the license moneys were received, declared in substance that the moneys should be applied towards defraying the expenses of local government therein. (Laws of 1892, ch. 401, § 15.) Under the act of 1896, which in effect incorporates into the thirteenth section this provision of the act of 1892, the same application is to be made of the excise taxes received by the cities and towns, as was prescribed by the act of 1892 in respect to license fees collected under that act.

Upon the point whether two-thirds of the traffic taxes imposed by the act of 1896 and which the thirteenth section declares shall belong to the town or city where the traffic is carried on, are public moneys within article 3, section 20 of the Constitution, it is important to notice that although this section has been since 1821 a part of the Constitution of the State, excise moneys collected during that whole period have been appropriated under a general law of the State exclusively to the localities where the licenses were granted to be applied to diminish local taxation or to some purpose of local charity. Indeed, this has been the

uniform policy of the State in respect of the disposition of excise moneys derived from the traffic in liquors from the foundation of the State government. By the earliest excise law of the State (Chap. 17 of the Laws of 1779) the excise commissioners were directed to pay the excise moneys collected in each county to the county treasurer, to be applied towards defraying the contingent expenses of the county. The system of appointing commissioners of excise has not been uniform. Under the Colonial Act (Chap. 54 of the Laws of 1775) they were designated by name in each of the localities. The act of 1779 designated certain officials to act as commissioners. Since that time county boards of excise have been created, as under the act of 1857, and subsequently town and city boards were substituted. Under the county system the excise moneys were paid to the counties, and under the system of town and city boards to the towns and cities in which the licenses were issued. But notwithstanding many changes from time to time have been made in the details of the excise system, there has, for a century of the State government and up to the act of 1896, been one uniform policy recognized by the legislature, namely: that moneys received for licenses for the liquor traffic should be paid over to the localities of the State in which the licenses were granted, to be applied to some object of local government or interest.

Under the former license laws large sums have been collected annually in cities, villages and towns. In a strict and accurate sense they were public moneys. No exaction can be lawfully made of a citizen by way of tax, impost or excise, except under the authority of the legislature, and the product of such imposition is public money. But there is a well settled distinction between the money of the State and money levied under corporate powers conferred upon cities, villages and towns for local and corporate purposes. In the latter case the money levied and collected is not the money of the State. It is the money of the town, city or village in which under the exercise of corporate powers it was levied and collected, and to it the State has no title. (*People v. Ingersoll*, 58 N. Y. 1; *Shepherd's Fold*, 96 id. 138.) In every city or village charter the power of local taxation for municipal purposes is conferred with authority to appropriate the money raised to purposes of local government. This, in a general sense, is an appropriation of public moneys to local purposes, but it has never been supposed that it was an

appropriation within the meaning of article 3, section 20 of the Constitution, so as to require a two-thirds vote to pass a bill granting a city or village charter.

The former excise laws stood upon a different basis from the charter laws of cities and villages. They were general laws applicable to the whole State, establishing a system for the regulation of the traffic in liquors, varying in some respects in their application in cities and towns. The system was administered through boards of excise, sometimes, as we have seen, appointed directly by the legislature, but generally elected in towns, with jurisdiction to grant licenses in the town for which they were elected, and in cities, appointed by local authorities. The excise commissioners, although locally elected or appointed, were State agencies for administering the excise system, and, like assessors, collectors and highway commissioners, were independent public officers, exercising public powers, and charged with public duties specially prescribed by law. (*Lorillard v. Town of Monroe*, 11 N. Y. 392; *People v. Van Keuren*, 74 id. 310.) In granting licenses they were not exercising a jurisdiction as agents of the corporation within which they acted, for the granting of licenses for the traffic in liquor was not a power vested in towns, villages or cities. They exercised their functions under the authority of the State, which prescribed their powers and duties, and the mode of their appointment was a convenient method for designating the agencies through which the system should be administered.

We assent to the claim of the counsel for the appellant that the towns, cities and villages never acquired any irrevocable right to receive the license fees collected. We do not doubt that it would have been competent for the legislature from the first to have required all license fees to be paid into the State treasury for general State purposes, or at any time to have changed the practice which was adopted. The reason for the legislative policy which has hitherto uniformly prevailed, to permit license fees to be applied to the uses of the locality where the traffic was licensed and carried on, is obvious, namely: to furnish some measure of indemnity against the public burdens thrown upon localities by the prosecution of a business therein under State authority, powerfully contributing to disorder, pauperism and crime. Seventy-five years have elapsed since the constitutional provision now in question first became part of the organic law,

and during that long period this practice, under statutes which concededly were enacted without a two-thirds vote, has prevailed, and has never hitherto been challenged as a violation of the Constitution. Those statutes as distinctly appropriated public moneys to local purposes as does the statute of 1896, and were even more subject to the constitutional criticism made to the act of 1896, since they appropriated to the use of the cities and towns not a part only, but the whole of the excise moneys collected. This legislative policy which has prevailed for so long a period, sanctioned by numerous statutes, never questioned in the courts and acquiesced in by all departments of the State government, is a practical construction of the constitutional provision now in question, that an appropriation of excise moneys to the use of towns and cities under acts passed by a majority vote, is not an infraction of the Constitution, and this construction ought not now to be disturbed.

We also assent to the proposition that the provisions of the former excise laws under which excise moneys were paid over to localities, constituted appropriations of public moneys. But the public moneys referred to in article 3, section 20, of the Constitution, are the public moneys of the State as contradistinguished from public revenues levied for local purposes by towns, cities and villages under State authority, or moneys which by a long course of legislation, as in the case of excise moneys, have been treated as standing in the same situation.

The act of 1896, also, we think, appropriates to the towns and cities the two-thirds of the excise taxes which may be collected under the act. But it is an appropriation which operates on the fund at the very moment of its collection. The two-thirds so appropriated never reaches the treasury of the State and never bears the impress of State money. The statute declares in express terms that two-thirds of the fund collected "shall belong to the town or city in which the traffic was carried on, from which the revenues were received." It was competent for the legislature so to declare by a majority bill, unless there is a distinction between excise money under former statutes and excise taxes under the act of 1896, which would justify such an appropriation in the one case, but not in the other. We think no such distinction exists. The claim that the act of 1896 is a tax law, having for its primary purpose the raising of revenue for the support of government, involves the theory that the legislature in

enacting it intended to depart from the principle upon which all excise laws have hitherto been founded. That principle has been by exaction and restriction to limit a dangerous traffic in the interests of social order and the public welfare. It is probably competent for the legislature to tax occupations or business as a source of revenue, and it could tax the liquor traffic for this purpose. The selection of the subjects of taxation rests with the legislature, and the imposition of a license fee for revenue on a business or occupation is an exercise of the power of taxation. (*The License Tax Cases*, 5 Wall. 462; *Cooley Const. Lim.* 201.) But an exaction imposed as a condition of the right to carry on a business dangerous to public morals or which may involve public burdens, by way of discouragement or regulation, is not in any proper sense a tax. It does not proceed upon the principle upon which taxes are levied, and upon which taxation is justified, viz., the protection afforded by the government to the taxpayer. The imposition is made in such cases generally for a double purpose, to discourage the business and to secure indemnity in part to the public from the losses and burdens which the business is likely to entail. The so-called excise tax is for the protection of the community and not for the protection of the person from whom it is exacted. It is said by Judge COOLEY, in his work on "Taxation" (p. 397), that "custom has much to do in determining whether certain classes of exactions are to be regarded as taxes or as duties imposed for regulation." There can be no doubt that a large revenue will result from excise taxes imposed by the act of 1896, nor that this was contemplated by the legislature. But this will be a consequence of the system, and was not the motive of its adoption. It was manifestly not the intention of the legislature to encourage the traffic, but to control, restrict and regulate it, and by the local option provision it is rendered possible that it may be wholly prohibited in every town of the State, a provision quite inconsistent with a purpose to encourage the traffic or to make it an ordinary source of revenue. The fact that the exaction is in the act denominated a tax is not conclusive. All exactions imposed upon citizens by public authority are in a general sense taxes whether imposed for regulation or revenue. The character of the act of 1896, whether a tax law in a proper sense, or a law enacted under the police power, must be determined from its whole scope and tenor, and there can be no reasonable doubt

we think that it is of the latter character. It is radically different in some respects from the excise laws which it supersedes. But the changes are in the administration of the excise system and not in its essential character. The most noticeable changes are: (1) State supervision in place of supervision through boards of excise, and (2) the opening of the traffic to all citizens (with certain exceptions) who shall pay the license tax, and give the bond required. The payment of the tax and the giving of the bond are conditions precedent to the right to engage in the business, and the imposition of conditions precedent is the distinguishing test of a license law. (See COOLEY, J., *Youngblood v. Sexton*, 32 Mich. 406; MARSHALL, J., *Adler v. Whitbeck*, 44 Oh. St. 539.) The analogy between the law of 1896 and the former excise laws is strongly marked. There is the same necessity of a public certification of a right to engage in the traffic; the same restrictions and regulations intended to guard the traffic and reasonably protect the public against its acknowledged evils; the same principle of local option, and the act incorporates the principle of the Civil Damage Law. The new features of the system may prove to be efficient means of repression and regulation; such as the change in the administrative agencies, and the much larger tax upon the right to engage in the traffic.

We do not deem it important to consider how far the legislature may go in alienating the public revenues, derived from the exercise of the ordinary power of taxation to local or private purposes, or in barring itself from a resort to the usual sources of taxation. Clearly it cannot appropriate the public moneys of the State for a local though public purpose, except by a two-thirds bill, and this whether the money is actually in the treasury of the State or in process of collection. But the legislative declaration in the act of 1896, that two-thirds of the excise taxes shall belong to the towns and cities, is in accordance with an uninterrupted legislative understanding that the legislature may devote excise moneys to the uses of the towns and cities in which they are collected, by majority bill, and it is now too late to question this construction of the Constitution.

Second. We perceive no force in the objection based upon the departure in the act of 1896 from the classification of cities made by article 12, section 2, of the Constitution. The section is new and its manifest purpose is to give some measure of

protection to cities against the evils of special city legislation. It divides the cities of the State into three classes according to population, the first class embracing cities having a population of 250,000 or more; the second, those having a population of 50,000 and less than 250,000, and the third, all other cities. The section then proceeds: "Laws relating to the property, affairs or government of cities and the several departments thereof are divided into general and special city laws; general city laws are those which relate to all the cities of one or more classes; special city laws are those which relate to a single city or to less than all the cities of a class." Then follow provisions for the transmission of a copy of every special city law after it has passed both branches of the legislature, to the mayor of the city for approval or rejection, before its final enactment and for subsequent action by the legislature in case of disapproval. The law of 1896 in fixing the excise taxes graduates them in cities according to population, but does not follow the classification in this section of the Constitution. More is exacted in New York than in Brooklyn or Buffalo, and more in Brooklyn than in Buffalo, although these cities are cities of the first class in the classification in article XII, section 2.

The conclusive answer to the constitutional objection based on this section is, that the act of 1896 is neither a general nor special city law, nor does it relate to the "property, affairs or government" of cities. It is a general State excise law, with such special provisions and adaptations to localities as to the legislature seemed proper. Whether the law should be uniform in its application to the cities of the State, or whether a discrimination should be made in the excise tax as between New York and any other city, and the extent of the discrimination, was in the discretion of the legislature. In enacting a general law under the police power, the legislature is not hampered or restrained by the classification of cities in the Constitution. It may adjust details to meet varying conditions. In a health law, regulations which might be suitable and proper for the city of New York, a great seaport, exposed to peculiar dangers from infection and disease, might be unnecessary, burdensome and oppressive if applied to an inland city like Buffalo. The constitutional limitation relates to city laws, either general or special, and not to general laws for the government of the State, including the cities therein. Nor is the law of 1896 a law relating to the "property, affairs or

government of cities.” The granting of licenses for the liquor traffic has never been a corporate function or duty of a city, as such. It is a function which the State in its aggregate capacity has administered. It has made use of local machinery as has been shown, and it has permitted the cities to use excise moneys for local purposes. But excise laws do not relate to the affairs of cities, and still less, to their property or government within the section of the Constitution now considered. Cities are affected by the act of 1896, as are all other localities in the State. But this is because in the framing of general laws, all places are alike subject to the legislative power. The act in question is not special legislation under the disguise of a general law. It will be the duty and we have no doubt the pleasure of the court, on a proper occasion, to give full effect to this new provision of the Constitution, and to construe it with that liberal spirit which is especially required in the interpretation of a remedial provision of the fundamental law, so that, if possible, it shall be efficient to secure the purpose of its enactment.

Third. The objection that the law of 1896 was a special city law, which, under article XII, section 2, of the Constitution, ought to have been referred to the mayors of the cities affected, has been answered in the consideration of the other objection based on this section. It was not a special city law. It did not relate to the “property, affairs or government” of any city within the meaning of the section referred to.

We find no ground for questioning the constitutionality of the act of 1896, and we, therefore, affirm the judgment below.

All concur.

Judgment affirmed.

Supreme Court, Saratoga Special Term, May, 1896. Reported. 17 Misc. 8.

PEOPLE ex rel. DANIEL CRAMER v. STEPHEN C. MEDBERRY, County Treasurer, Etc.

1. Excise—Liquor tax certificate—Population to be determined solely by state or federal census.

For the purpose of fixing the rate of tax to be paid under subdivision 1 of section 11 of the act of 1896, the population is to be determined solely by the last State or federal census.

2. Same—Rate when population not given by census.

If the population of a given locality is not shown by either the last State or federal census, it falls within the provision of the statute of "any other place," and the tax in such case is \$100.

Application to compel the county treasurer of Saratoga county to issue to the relator a liquor tax certificate, under chapter 112 of the Laws of 1896, known as the "Liquor Tax Law."

Thomas O'Connor and J. W. Houghton, for relator.

J. S. L'Amoreaux, for respondent.

McLAUGHLIN, J. The relator applied to the county treasurer of Saratoga county for a certificate, under chapter 112 of the Laws of 1896, permitting him to traffic in liquors to be drunk on his premises, which are situate in the village of Waterford, in said county. At the time he made his application he tendered to and left with the county treasurer the sum of one hundred dollars (\$100), the amount of tax as claimed by him. The county treasurer refused to issue to him the certificate provided by the act above referred to, upon the ground that the tax was two hundred (\$200) instead of \$100. The sole question, therefore, to be determined upon this application is whether or not the relator is entitled to a certificate permitting him to traffic in liquors to be drunk on his premises upon the payment of the sum of \$100.

The correct answer to this question, of course, depends upon the construction given to the statute. Section 11 provides that: "Excise taxes upon the business of trafficking in liquors shall be of four grades and assessed as follows:

"Subdivision 1. Upon the business of trafficking in liquors to be drunk upon the premises where sold * * * if * * *

in a city having by the last State census a population of fifteen hundred thousand or more, the sum of eight hundred dollars; if in a city having by said census a population of less than fifteen hundred thousand, but more than five hundred thousand, the sum of six hundred and fifty dollars; if in a city having by said census a population of less than five hundred thousand, but more than fifty thousand, the sum of five hundred dollars; if in a city or village having by said census a population of less than fifty thousand, but more than ten thousand, the sum of three hundred and fifty dollars; if in a city or village having by said census a population of less than ten thousand, but more than five thousand, the sum of three hundred dollars; if in a village having by said census a population of less than five thousand, but more than twelve hundred, the sum of two hundred dollars; if in any other place, the sum of one hundred dollars."

Subdivision 4 of same section provides:

"When the population of a city or village is not shown by the last State census, it shall be determined for the purposes of this act by the last United States census."

The village of Waterford was incorporated in 1794. Its population is not shown by either the last State or federal census, and it cannot be determined by the return made by the enumerators without the aid of extrinsic evidence. The respondent, however, insists that at the time each enumeration was taken the village then had a population of over 1,500, and the same is clearly shown by evidence submitted upon this application. This is undoubtedly true — in fact, the relator does not deny it, but insists that the population must be determined in the manner pointed out by the statute; and, for the purposes of fixing the tax, cannot be determined in any other manner, and that, inasmuch as the population is not shown by either the last State or federal census, the village of Waterford comes within the provision of the statute providing that the tax "if in any other place, the sum of one hundred dollars." I am inclined to think that the relator's contention in this respect is correct. The act in question having provided a method for determining the population, for the purpose of fixing the tax, the population must be determined in the manner provided by statute and cannot be determined in any other way.

The true construction to be given to the statute for the purpose of fixing the tax, it seems to me, is this: All certificates

of the first, second and third classes are to be issued upon the payment of a tax, the amount of which is regulated by the population of the municipality where the business is to be conducted *as shown by the last State census*; or, if the population is not shown by the last State census, then it must be determined by *the last United States census*. And, if it is not shown by the last State or federal census, then it comes within the provision of the statute providing that in any other place the tax shall be \$100. The method provided for determining the population is a fixed and arbitrary one. The legislature had the power to select this method, and, having selected it, that method, and that method alone, must be followed. If the respondent can introduce evidence to show that the population of the village in question was, at the time the enumeration was taken, over twelve hundred, then the relator can introduce evidence to show that it did not, in fact contain that number of inhabitants. To avoid such a contest was the very thing that the legislature intended to do, and the reason for it is quite manifest. The act not only seeks to regulate the trafficking in liquors, but it also seeks to provide a revenue for the State; and, if the population of a given locality is not shown by either the last State or federal census, then it falls within the provision of the statute of "any other place." To hold otherwise, the words "any other place" would have to be eliminated from the statute, and that would, in effect, destroy one of the objects sought to be accomplished by the statute itself. The court can well take knowledge of the fact that, if the population of a given locality must first be determined as a question of fact before the amount of the tax can be fixed, the expense incurred in so doing might diminish, in no small degree, the amount which the State otherwise would receive. If there are localities in the State, the population of which is not shown by the last State or federal census, the legislature has the power, by future enactments, to regulate the amount of tax in such places. Having reached this conclusion, I think the relator is entitled to a certificate, he having tendered to the county treasurer the amount of tax required, and an order can be entered to that effect; the form of the order to be agreed upon or settled on notice.

Ordered accordingly.

Supreme Court, Monroe Special Term, May, 1896. Reported 17 Misc. 11.

THE PEOPLE ex rel. THE ROCHESTER WHIST CLUB v. JOHN B. HAMILTON, Treasurer of the County of Monroe.

1. Excise—Liquor Tax Law—Bona fide social clubs need not take out tax certificate.

A bona fide social club, regularly organized for a legitimate purpose, with a limited and selected membership, which, incidentally, furnishes liquor to its members exclusively, upon payment of a sum equal to the price of such liquor and a small addition for the expense of serving it, which sum is paid into the treasury and used for replenishing the stock, is not within the provisions of the Liquor Tax Law of 1896, and is not required to take out a certificate.

2. Same—Sale or trafficking.

Such a method of furnishing members with liquors is not a sale or trafficking in liquors within the meaning of section 31 of the act.

CERTIORARI to review a decision of the county treasurer of Monroe county, refusing to issue a liquor tax certificate to the relator.

Frank M. Bottum and John A. Barhite, for relator.

George E. Forsyth, district attorney, and Charles E. Bostwick, for defendant.

DAVY, J. This is a proceeding by certiorari to review the decision of the county treasurer of Monroe county in refusing to issue to the relator a liquor tax certificate, as provided in chapter 112 of the Laws of 1896, commonly known as the Raines Liquor Tax Law.

The reasons stated in the return for refusing the certificate are, that the relator is a corporation organized to promote social intercourse among its members and to provide them with the conveniences of a club-house, and that it can not engage in the business of trafficking in liquors. It is hardly necessary in this case to discuss the discretionary power that is vested in the county treasurer under the statute, to grant or refuse a liquor tax certificate. I am inclined to think, however, that if any person who applies for such a certificate brings himself squarely within the terms of the law by complying with all the statutory

preliminaries, that the certificate can not legally be withheld; but as these proceedings are instituted in a friendly manner and for the purpose of obtaining a judicial construction of the statute pertaining to the relator's legal right to dispense liquors to its members, the only question, therefore, which I deem it necessary to consider upon this application is, whether the relator is required, under the provisions of said act, to take out a liquor tax license.

It is conceded that the relator is a *bona fide* club and was duly incorporated on the 10th day of January, 1884, having among its objects the promotion of social enjoyment and recreation among its members, such as the practice and cultivation of the game of whist and other innocent amusements. The organization has followed the familiar rule of adopting a constitution and by-laws which set forth the object of the society and the qualifications for membership and the number and character of its officers. These together with its charter, constitute its fundamental law, and are the source and limit of its authority to transact business. The relator rents and furnishes a large house which is located at No. 40 North Fitzhugh street, which contains parlors, a reading-room, billiard and card-rooms, a dining-room, kitchen and store-room, and a room in which liquors and cigars are kept and dispensed to the members of the club only upon their oral or written request, at a price fixed therefor by the house committee, for which the members ordering the same may pay cash, or have it charged and pay therefor monthly. This fund, together with the annual dues and initiation fees, are used in paying for the liquors and other supplies which are consumed by its members, and in defraying the general expenses of the club.

The membership of the club is limited and consists of resident and nonresident members, and no person can be admitted as a member unless he is twenty-one years of age and his name has been proposed by two members of the society who are in good and regular standing. The rules also require that his name, with the names of those who proposed him for membership, shall be posted upon the bulletin board of the club for at least two weeks before he can be elected. At the election two negative votes or black balls are sufficient to exclude any candidate. Members are divided into two classes, resident and nonresident. The initiation fees are, \$20 for resident members, and \$10 for nonresident members, and the annual dues are \$32 per year for resident members,

and \$10 per year for nonresident members. The constitution also provides that each member shall have the right to entertain a friend not residing in the city of Rochester to the privileges of the club for the space of two weeks, upon recording the name and residence of such friend in the visitors' book, together with his own, and producing from an officer of the club a card of invitation. A member at whose request an invitation is given to a guest is held responsible to the club for all obligations of such guest. The club-house is open to its members at all times, but no games of any kind are permitted to be played on Sunday or any other time for money. Many of its members make the club-house their home, except for lodging, and they spend much of their time when not engaged in business in its parlors and reading-room, and in playing and enjoying the familiar game known as whist.

The committee having the management of the organization usually orders, from time to time, such quantities of provisions and liquors as will meet the demand of the individual members of the club. The food is served in the dining-room and the liquors are dispensed to its members by its steward and other servants at prices fixed by the officers of the club. The prices for liquors are intended to cover the actual cost of the articles furnished and the expenses incurred in serving them. The money so received is paid into the treasury, and is again used for replenishing the stock, which are in like manner dispensed to the members. It is evident that if the members only paid into the treasury the cost price of the liquors, there would be no fund to pay the servants and other outlays necessarily incurred in dispensing them, and the deficiency would have to be made good out of the funds received from initiation fees and annual dues. The plan adopted is a simple method of assessing each member the cost price of the liquors he consumes, and, in addition thereto, a sufficient sum to pay the expenses incurred in serving them. The relator has pursued this method of supplying liquors and refreshments to its members ever since its organization, and its right seems never to have been questioned or challenged before.

Black, in his work on Intoxicating Liquors, says, "Whether or not a social club, such as are very common in all large cities, may lawfully furnish liquors to its members, as a part of the entertainment which it provides for them, without procuring a license or paying a tax as a retailer, is a question which has provoked great

discussion of late years, and upon which the authorities are by no means harmonious." After referring to the authorities in the different States upon the subject, he reaches the conclusion that the intent must govern, and that if the organization is a *bona fide* club "and conducted in good faith, with a limited and selected membership, really owning its property in common, and formed for social, literary, artistic or other purposes, to which the furnishing of liquors to its members would be merely incidental—in the same way and to the same extent that the supplying of dinners or daily papers might be, then it can not be considered within either the purpose or letter of the law."

Notwithstanding the conflict of authorities in other States upon the subject, I think that the question is no longer a doubtful one in this State. The recent decision of the Court of Appeals, in the case of *The People v. Adelphi Club*, 149 N. Y. 5, holds that a *bona fide* social club, regularly organized under the statute for legitimate purposes, to which the furnishing of liquors to its members is merely incidental, and having a limited and selected membership, does not constitute a sale within the meaning of the Excise Act of 1892. Nothing can be said that will throw any additional light upon the question under consideration than what is stated in the very interesting and exhaustive opinion of Judge Haight, in the *Adelphi Club* case, *supra*. The learned district attorney contends, however, that the recent statute of 1896 is much more comprehensive and stringent in its terms than the act of 1892, and was intended to include social clubs within its provisions, and, therefore, the decision of the Court of Appeals in the *Adelphi Club* case is not controlling in this proceeding. The legislature, in the act of 1896, has prohibited all persons, corporations, associations and copartners from engaging in the business of trafficking in liquors except as authorized in said act, but it has not undertaken to prohibit the drinking or buying of liquor or the distribution of it in severalty among persons who own it in common.

The question then arises whether the regulations adopted by the Whist Club for dispensing liquors among its own members constitute the business of trafficking in liquors within the meaning of section 31 of the act of 1896, which makes it unlawful to carry on the business without a tax license. A corporation, being a mere creature of the law, can exercise no power or authority except such as is conferred or authorized by its charter. This

principle has been so often applied in the construction of corporate powers, that I do not deem it necessary to refer to authorities. The relator's charter and its by-laws are the measure of its powers. It can engage in no enterprise or business beyond the purpose and object of its charter. If liquors and cigars are furnished to its members, it is merely incidental to the business for which it was incorporated. No one would entertain the idea for a moment that the relator could engage in the business of banking or the business of manufacturing articles of merchandise, and yet it would have just as much power and authority, under its charter, to engage in either of these enterprises as it would to throw open its doors to the public and engage in the business of trafficking in liquors.

Clubs are now, and have been for years, an important feature of social life in all large cities. Many of them occupy buildings of their own, which contain reading-rooms, library, smoking-rooms and restaurant, baths, and even bedrooms. They are usually organized to meet for social intercourse and the promotion of literature and science. They are always open to the members the same as a man's dwelling-house is open to the members of his family. It is well known that liquors are dispensed to their own limited and selected members, and that they never have been required in this State to take out a license. If the legislature intended that these well-known organizations should take out licenses to sell liquors exclusively to their members, it is singular that the statute should contain no provision for the issuing of liquor tax certificates to them. The fact that clubs are not mentioned in the act has an important bearing upon the meaning to be placed upon the statute in reference to taxing such organizations. The intention of the legislature upon this point must be ascertained from the context of the act. It is a familiar rule that when the language of an act of the legislature is plain and without ambiguity, the act construes itself, and courts will presume that the legislature intended what is plainly expressed therein.

Section 31 provides that it shall not be lawful for any corporation, association, copartnership, or person who has not paid a tax as provided in section 11 of this act, and obtained and posted a liquor tax certificate, to sell, offer or expose for sale or give away liquor in any quantities less than five wine gallons at a time, and without having paid such tax and complied with the

provisions of this act, to sell, offer, or expose for sale, or give away on the premises of such vendor, or in any building, booth, yard or garden appertaining thereto or connected therewith. It also provides that it shall not be lawful for any corporation, association, copartnership or person, whether they have paid such tax or not, to sell, offer, or expose for sale or give away any liquor on Sunday or before 5 a. m. on Monday, or on any other day between 1 o'clock and 5 o'clock in the morning. Section 11 provides that the excise tax upon the business of trafficking in liquors shall be of four grades. First. Upon the business of trafficking in liquors to be drunk upon the premises where sold or which are so drunk, whether in a hotel, restaurant, outbuilding, yard or garden appertaining thereto or connected therewith. Second. Upon the business of trafficking in liquors in quantities of less than five wine gallons, no part of which shall be drunk upon the premises where sold or in any outbuilding, yard, booth or garden appertaining thereto or connected therewith. Third. Upon the business of trafficking in liquors by a duly licensed pharmacist, which liquors can only be sold upon the written prescription of a regularly licensed physician, signed by such physician. Fourth. Upon the business of trafficking in liquors upon any car, steamboat or vessel, to be drunk on such car or any car connected therewith or any such steamboat or vessel or upon any barge attached thereto or connected therewith. It seems to me that these requirements are inconsistent with the idea that the legislature intended that a social club whose doors are closed to everybody except its members should take out a liquor tax to traffic in liquors exclusively with its own members. The act, in my judgment, is not intended to apply to a business conducted in a private manner and in a place to which the public could not have free access.

It was conceded, upon the argument, by the learned counsel for the defendant, that the question whether social clubs were required to pay a tax would depend largely upon the construction which the court would give to the words "trafficking in liquors." It is generally understood that a trafficker is one who is engaged in a particular branch of business or trade, like a merchant who buys and sells goods for a profit. Can it be said that this club, which deals solely with its members, could barter and carry on a traffic in the sale of liquor for a profit when every dollar paid for liquors would go into the treasury and become the joint

property of its members? The question of sale or traffic in liquors depends upon the character of the act. In *Graff v. Evans*, 8 Q. B. Div. 373, Field, J., says, a sale involves the elements of a bargain. There must be a buyer and a seller to make a sale of merchandise. The liquors of the club being the common property of its members, they cannot sell it to themselves. There could be no bargain and sale between them because the money which is paid into the treasury by the men who consume the liquors remains the joint property of all its members. Such a system, it seems to me, lacks the very elements of a bargain and sale. It could not be seriously contended that the members of a family who unite in purchasing a quantity of liquor for their own consumption would violate the statute which prohibits the trafficking in liquors without a tax license. The statute nowhere prohibits the buying and drinking of liquors. The individual who sells it is the one who trafficks in the article and not the consumer. The club does not sell or keep for sale any liquors. It keeps on hand liquors which are the common property of its members, to be distributed among them when called for. While the club, as a corporation, may be held liable for the liquors and provisions ordered by its committee for its members, yet that fact does not establish that it is engaged in the traffic or sale of those articles. In the case of *The People v. Adelphi Club, supra*, Judge Haight says: "Whilst property and supplies are technically owned by a club, each member is in equity an equal owner in common. The fact that a payment was made does not change the character of the act, for it was but a means adopted by which each member could receive his own and not that of his fellow members. The payment went into the treasury ultimately to restore that which he had taken." I am unable to discover any distinction between the Excise Act of 1892 and the Liquor Tax Act of 1896, so far as it relates to social clubs. The act of 1892 prohibits persons from selling liquors without a license. The act of 1896 prohibits persons, corporations, associations and co-partners from carrying on the business of trafficking in liquors without a liquor tax license. The word "sales" in the act of 1892, and the word "trafficking" in the act of 1896 are words of like significance in their meaning. Section 2 of the act under consideration defines the meaning of the words "trafficking in liquors." It provides that the sale of liquors in quantities of less than five gallons shall be "trafficking in liquors." We have,

therefore, a well-defined meaning of the words "trafficking in liquors" in the act itself, and it is plain to be seen that it is not aimed at social clubs, but at those who sell liquors for a profit in places of public resort. Sale by retail means sale to any member of the general public who may come to buy, and the proprietor of a licensed house has no option to refuse to admit the public to his premises during the hours and days he is legally permitted to sell liquors.

This club, therefore, being limited in its members and not a place of public resort, could not be licensed to sell liquors. In support of this contention it will be seen that section 18 of the act provides that every applicant for a liquor tax license is required to give a bond that he will not keep a disorderly house or permit gambling upon the premises. This provision of the statute when taken in connection with section 21, which requires the applicant before commencing business to post up his liquor tax certificate in a conspicuous place where the traffic in liquors is carried on, so that all persons visiting such place may readily see the same, and if there be a window facing the street on the same floor where such business is carried on, such certificate must be displayed from the window so that it may be readily seen from the street. These requirements indicate that the legislature intended that the business of trafficking in liquors, and the places where such trafficking is carried on, should be open to the public, and that all persons should have free access to the same, and that persons who are opposed to entering restaurants and places of amusements where intoxicating liquors are sold should have notice by the posting of such tax certificate in the window, that the business of trafficking in liquors is carried on within. The relator's club-house cannot be turned into a place of public resort without forfeiting its charter. If it were required to take out a liquor tax license it would be compelled to keep its club-house open to the public, and during the hours when the sale of liquors is prohibited to have no curtains upon its windows, screens or blinds, opaque or colored glass that would obstruct the view from the sidewalk of the place where liquors are sold or kept for sale, so that the public could have full view of what transpired within. I am constrained, therefore, from the language of the act to adopt the view that the relator's manner of furnishing liquors to its members does not constitute a sale or the business of trafficking in liquors within the meaning of

the Liquor Tax Law of 1896, chapter 112. Having reached this conclusion, the application to compel the county treasurer to issue a liquor tax certificate to the relator must be denied and the writ of certiorari quashed, but without costs.

Ordered accordingly.

Supreme Court, Monroe Special Term, May, 1896. Reported 17 Misc. 19.

Matter of the Application of FRANK P. UNDERHILL.

1. Excise—Liquor Tax Law—Measurement of distance between saloon and nearest dwelling.

In determining whether the distance between the entrance to a saloon and that of the nearest dwelling is within 200 feet, the statute (chapter 112, Laws of 1896) does not require the measurement to be taken in a direct line where buildings or parts of buildings intervene, but such measurement should be taken by the most feasible and practicable manner of passing between them, without regard to the sidewalks, and around a corner if necessary.

2. Same—Entrance to saloon situated in second story.

Where a saloon is situated in the second story of a building, at the head of a stairway used in common by tenants of the building, the street entrance is the one, within the meaning of the statute, from which the measurement should be made.

APPLICATION to revoke and cancel a liquor tax certificate issued to the respondent under the provisions of the Liquor Tax Law, upon the ground that the nearest entrance to the respondent's premises in which he is engaged in the traffic in liquors is within two hundred feet of the nearest entrance to a building or buildings occupied exclusively for a dwelling, and that the respondent upon making his application for a certificate did not file with his statement a consent in writing executed by at least two-thirds of the owners of such buildings that such traffic might be carried on in the place aforesaid.

Royal R. Scott, for petitioner.

John Colmey, for respondent.

NASH, J. The question presented here is, whether within the meaning and intent of the statute the nearest entrance to the

premises of the respondent is within two hundred feet of the nearest entrance to a building or buildings occupied exclusively for a dwelling.

The respondent's premises, in which the traffic in liquors is carried on by him under the certificate which he has obtained, consist of rooms of which he is the lessee occupied by him as a saloon situate in the second story of the building in the village of Victor, known as the Lovejoy block, the entrance to which is by a covered stairway leading up from the sidewalk below and in front of the building. The stairway is outside of the Lovejoy building and between that and another building known as the Simonds block, the distance between the buildings being the width of the stairway. This stairway is used in common by the occupants of the second floors of both buildings.

It is contended on behalf of the respondent that the entrance to his premises is the door of his saloon at the head of the stairway, and that measuring from that entrance down the stairs and by the nearest feasible way from the foot of the stairs to the nearest entrance of the nearest building exclusively occupied as a dwelling, the distance from the entrance to his saloon is over two hundred feet. But measuring the distance from the door of the saloon through buildings in an air line, the distance is less than two hundred feet to several of the neighboring dwellings. The provision of the statute under consideration should have a reasonable construction, and it would seem that the most feasible way which one could go from the entrance to the saloon to the entrance to a dwelling, not necessarily by the sidewalk, but in an air line where it is practicable, as by going directly or diagonally across a street or a yard, or around the corner of a building if that is the only way practicable to go from one point to the other, is the way of measurement intended by the legislature; if a direct line from one place to the other in all cases were intended, the law should have so stated.

As to the question which shall be regarded as the nearest entrance, the door entering the room or the entrance at the foot of the stairway, the case is not so clear. The door at the head of the stairway is the entrance to the respondent's premises. That is the entrance into his saloon from the outside of the building and the only entrance thereto which he owns and has the exclusive control of, the stairway being used in common with the occupants of the other building. But the stairway is an

entrance to his premises, and it also is an entrance which he has the legal right to use and does use. If he had the exclusive use and control of the stairway under the demise of the saloon premises there would, I think, be no question but that the entrance to the stairway would be regarded as the entrance to the respondent's premises and the nearest entrance within the meaning of the statute from which the measurement to the entrances of the dwellings within two hundred feet therefrom should be made. The fact that the demise is of the use of the stairway in common with others makes it no less an entrance to the respondent's saloon.

The object of the provision of the statute under consideration is to remove places in which traffic in liquors is carried on from close proximity to dwellings. The law fixes two hundred feet between the nearest entrance to the dwelling and the nearest entrance to the premises where the traffic in liquor is carried on as the limit. These would ordinarily be the street entrances, and were no doubt the entrances which were intended to be taken for the purpose of the measurement.

I am of the opinion that in this case the street entrance to the respondent's premises is the one, within the meaning of the statute, from which the measurement should be made. If the foot of the stairway is taken as the entrance to the respondent's premises from which to measure to the nearest entrance to a building occupied exclusively for a dwelling, measured in the way already indicated, a direct line over an unobstructed route across the street to the entrance to the premises of Mr. Gallup, and thence directly to the entrance to his dwelling, the distance is less than two hundred feet, and consequently the respondent was not entitled to Liquor Tax Certificate, No. 29,332, issued to him by the treasurer of Ontario county.

Order revoking and cancelling the same granted; the question being new it is without costs.

Application granted, without costs.

Supreme Court, St. Lawrence Special Term, June, 1896. Reported.
17 Misc. 405.

THE PEOPLE ex rel. ORLO C. RICHARDSON v. M. R. SACKETT, as
County Treasurer.

**1. Excise—Liquor Tax Law—Towns in which no license has been
previously granted.**

Where there are no existing licenses in a town, the county treasurer can not grant certificates in such town until a vote on the question has been taken at a town meeting.

2. Same—Character of applicant—Previous conviction cured by pardon.

A person who was convicted of a felony many years ago, but has received a pardon, is not a convict under the ban of the law, and should not be refused a certificate solely on that ground.

CERTIORARI to review the action of the county treasurer of St. Lawrence county in refusing a liquor tax certificate to the relator, a hotel-keeper in the town of Russell.

John C. Keeler, for relator.

L. P. Hale, for county treasurer.

RUSSELL, J. There are various objections which are fatal to the application of the relator for a liquor tax certificate allowing him to sell liquor in his hotel at Russell. The local option provisions given by section 16 (chap. 112 of the Laws of 1896), allow the electors of the town, at a town election, to determine whether liquors shall be sold in that town, and in case of their voting against such privilege, the county treasurer has no right to issue such certificate.

But in various of the towns of the State, prior to the enactment of the Raines Bill, no licenses existed because the commissioners of excise, using their discretion, did not approve of granting licenses. In order to provide for the condition of such towns and to guide the county treasurers, before any town election occurring after the passage of the act should evince the will of the electors of the town, section 16 provides, that in any town in which at the time that act became a law there was no license, it should not be lawful for the county treasurer to issue

any liquor tax certificate, provided by that act, until the town had voted upon the question.

The provision was evidently in harmony with the spirit of the act allowing the towns to be free from liquor selling under the protection of the law, if they so chose, and providing a practical method of giving a county treasurer evidence of such determination. Before any vote could be taken at a town meeting, he must be guided by the fact that no license existed. His evidence of such fact could only be the proof that in fact no license had actually been issued to any applicant. It will not, therefore, do for the counsel of the relator to furnish evidence of an inclination on the part of the majority of the commissioners of the town of Russell to give a license, even if those two commissioners were lawful commissioners of excise, when the fact was that no license had actually been given and none was outstanding, in fact, at the time of the passage of the new Excise Law.

There are other objections to the application which need not be here considered. I do not place among them as controlling, however, the fact that some eighteen years ago the applicant was convicted of a felony, as he has since received his pardon. It is for the interest of the State that all persons convicted of crime should become law-abiding citizens, and evince by good conduct their desire to become better men. The restoration afforded by a pardon to civil rights covers all civil rights, and I think that one who has become a voter and who might lawfully hold any office can as well discharge the responsibility of hotel-keeping, including liquor selling, and is no longer a convict under the ban of the law.

In this case the action of the county treasurer is affirmed, with costs.

Ordered accordingly.

Supreme Court, St. Lawrence Special Term, June, 1896. Reported
17 Misc. 406.

THE PEOPLE ex rel. GEORGE M. THOMAS v. M. R. SACKETT, as
County Treasurer.

Excise—Liquor Tax Law—Local option.

A special town meeting may be called and legally held to determine in the first instance whether tax certificates may be given for the selling of liquors in the town.

CERTIORARI to review the decision of the county treasurer in refusing a liquor tax certificate to the relator, who is a hotel keeper in the town of Edwards, St. Lawrence county.

John C. Keeler, for relator.

L. P. Hale, for county treasurer.

RUSSELL, J. The sole question to be decided in this case is whether a special town meeting may be called and legally held to determine whether tax certificates may be given for the selling of liquors in the towns of this State. The provisions affecting cities are different from those affecting the various towns upon the question of local option. The counsel for the county treasurer frankly concedes the regularity of the special town meeting held in the town of Edwards, after the passage of the general Excise Law known as the Raines Bill, which voted in favor of selling liquors, and makes no criticism on the fairness of the expression of the voters casting their ballots at such election.

The new Excise Law differs widely from the previous law in force, and the provision for local option is direct instead of being indirect as under the previous law. Heretofore, commissioners of excise were elected by force of law in each town of the State, and the granting or withholding of licenses was within their discretion or caprice. Their views upon the subject, when elected, might be known or unknown, and their subsequent action might or might not follow the inclination supposed to exist when the voters cast their ballots.

By the new act it is given to the towns to determine by lawful vote whether liquor shall be sold in the respective towns, and the

county treasurer has no discretion in granting or withholding, other provisions of law being complied with. In many towns of the State no annual election can be held for nearly a year after the passage of the new Excise Law. I see no provision in the act which contemplates the holding the power of the town, to declare for or against the permission to sell liquors in that town, in suspension during such a period. Its theory is radically different. The power of the various towns upon the subject is coexistent with the force of the law, and began when that law took effect. And, as the subject to be voted upon is one which is regarded as affecting the morals and well-being of the community, it might well have been the intent of the legislature to allow it, if the electors so chose, to be dissevered from the complications of an annual town meeting, at which town officers are to be elected and various money propositions voted upon, so far, at least, as the first vote upon the subject was to be taken.

Section 16 of the act (chap. 112 of the Laws of 1896) provides for the subject of local option. It requires the town officers to prepare the ballots "for a town election occurring next after the passage of this act," for voting upon four propositions.

First. Upon the subject of selling liquor to be drunk on the premises where sold.

Second. Selling liquor not to be drunk on the premises where sold.

Third. Selling liquor as a pharmacist.

Fourth. Selling liquor by hotel-keepers.

It would thus seem to be required by law that where a special town meeting is held, after the passage of the act, and before the annual town meeting, perhaps nearly a year later, ballots must be prepared for voting upon the excise propositions. The word "annual" is not prefixed to "town election." And this view is still farther strengthened by the provision in the same section that the same questions shall be submitted again in the same way at the annual town election held in every second year thereafter, provided ten per centum of the voters so request. Unless, therefore, it is construed that the use of the two expressions was carelessly made by the legislature in the same section, we must presume that they intended that the language should cover any town meeting in the first instance.

Under the present provisions of law the electors at special town meeting may vote upon any question which may be lawfully

voted upon or determined at a special town meeting, and that law now provides for the method of filing applications for requesting a vote at such town meeting; for public notice of the presentation of the question, and the preparation of the ballots therefor. R. S. (Banks' 9th ed.), p. 734, §§ 25, 34, 26.

The electors of the State, under the new Excise Act, were confronted with a new state of things in respect to the vending of liquors. They had the power in the various towns to determine whether liquors should be sold or not, within the town, and had the full right to consider how soon, and in what manner, in respect to this important law, their action should be taken. Such power should not be suspended for many months; it should operate as quickly as the law itself. The question of licensing was not to be determined as theretofore by their own town officers acquainted with the wishes of the people of the town, but, within certain defined limits, the power to sell liquor could be placed upon them against their will because the officer issuing the certificate had not the power to give or withhold. Thus the right of local option, given by the law, is one which should be used unless the electors were contented with the conditions likely to be prevalent in the town in respect to the number of places seeking the privileges afforded by the tax certificate.

The principal argument against the construction, advanced by the counsel of the county treasurer, is the provision that a vote against licensing shall not shorten the term for which any liquor tax certificate may have been given under the provisions of this act, nor affect the right of any persons thereunder. Section 16. He claims that this would display a want of mutuality in the effect of the vote, in that if the special town election voted favorably to license, such licenses might be granted, while if it voted against licensing, those certificates which had been issued would be preserved in force until their expiration. The provision referred to has an evident meaning which sufficiently accounts for its insertion in the section. It preserves the pecuniary rights of one who has paid for his privilege, and in that sense is just, as no other provision is made for paying him back for the unexpired term of his certificate. It would have the same effect, if the electors declared against license at an annual town meeting, as to the certificate issued shortly prior thereto, and no distinction of construction, therefore, existed to point the intent

of the legislature to distinguish between a special election and an annual one.

Indeed, the insertion of this language preserving the right of the party holding the certificate, in case the town votes against licensing, rather corroborates the theory of the instantaneous force of the law. The provision is not, that notwithstanding the vote against license the power to issue certificates shall remain until the expiration of any license granted; it solely excludes the idea of granting any more licenses except the one in operation, and which has been paid for, until a period in the future.

The action of the county treasurer, therefore, must be reversed, with costs.

Ordered accordingly.

Supreme Court, St. Lawrence Special Term, June 1896. Unreported.

PEOPLE ex rel. ORLO C. RICHARDSON v. M. R. SACKETT, as County Treasurer.

RUSSELL, J. The relator seeks to review the refusal of the county treasurer to issue to him a liquor tax certificate for use in a hotel in the town of Russell. This town was one in which no licenses were granted by the former commissioners and the applicant seeks to justify his request under the present law through the vote of a special town meeting, called for that purpose, at which a majority of the ballots were cast in favor of issuing certificates to hotels. One objection made to the application by the county treasurer is that the special town meeting was not properly called and held. It is conceded that this special town meeting was called for two o'clock in the afternoon, and the balloting then proceeded which resulted favorably to the granting of such application. The direction of the statutes for holding of town meetings at which ballots are cast requires the polls to be opened at sunrise and continue open till sunset. The design of this provision is to afford electors substantially the whole of the day to deposit their ballots, so that a full expression of the will of the electors may be conveniently had. There is a wide difference between the power of an annual town meeting and that of a special town meeting, the latter being called under the authority of the statute for special purposes, while the annual

town meeting is the assemblage of the constituent members of the municipal corporation, clothed with general power and authority to transact business for the town, except as limited by law. At annual town meetings the electors have power to determine where a meeting shall be held and any departure from regularity does not vitiate the action unless so radical in its character as to be of fundamental variance from the object or design of such meetings.

In special town meetings, however, the electors act within narrow limits and must proceed without any substantial departure from the form prescribed where those forms are designed to assure a full vote and opportunity of expression. To narrow the privilege of voting, in the very inception of the steps necessary to call the meeting into existence, to a limit of three or four hours, where the design was to give substantially the whole of the light of day to the electors in going to the place, voting and returning home, in a rural township, is such a substantial departure from the statutory authority and its object that I regard such a meeting as ineffective to adopt a radical change in the policy of the town.

Nor does it seem as though it was within the province of an executor of a will to obtain a license to sell liquors and carry on the business of a hotel. Assuming that this executor had the power to lease to another who could, or that he had the lawful right of possession so as to enable him personally to carry on the hotel business and sell liquors with entire freedom from penalty and under the protection of the law he should have applied as a person and not as an executor acting in a trust capacity, as it is the design of the law to make the proper conduct of the business a personal liability and as the executor should not have the power to involve the estate as a trustee in the liabilities for the conduct of the business.

It was the duty of the county treasurer, although acting in a ministerial capacity, to see that the proper steps were taken which justified him in issuing the tax certificate and that the papers upon the application presented the case of a person included in those who by law have the right to apply for a certificate.

The determination of the county treasurer is, therefore, affirmed with costs.

Supreme Court, Washington Special Term, June, 1896. Unreported.

In the matter of the petition of Job H. Wilbur to revoke the liquor tax certificate of Nathaniel B. Welling.

STOVER, J. The question presented is whether, in a town where there had been no licenses issued prior to the time when the Liquor Tax Law took effect, viz.: March 23, 1896, the county treasurer is authorized to issue a certificate to one to whom the board of excise had granted a license after March 23, 1896, viz.: April 6, 1896.

The application for cancellation of the certificate was made upon two grounds. First, that there being no license in the town prior to March 23, 1896, the issue of the certificate was unauthorized. Second, that the requisite number of consents of property owners had not been obtained. The latter ground was abandoned or waived upon the return of the order to show cause. An answer was filed, but upon the argument it was conceded that there was no license issued in the town prior to the time when the act took effect, viz.: March 23, 1896, but it is insisted by the holder of the certificate that the town board had a right to grant a license after March 23, 1896, that is, after the Liquor Tax Law became a law, and that such license entitled him to a certificate from the county treasurer, the contention being that the act did not become a law as to the issuing of licenses until the 30th of June, 1896, at which time the act made all licenses expire, that the construction of "shall become a law" meant so far as it affects persons, and did not mean when the law went into effect as a law. I can see no valid ground for such construction. The legislature had a right to fix a time arbitrarily at which, and beyond which, no license should be issued by the excise board. The intention, evidently, of the law was, that in towns where no license had been issued at the time the law took effect, no licenses or certificates should be granted until the people of the town had voted therefor. Therefore, and in order to avoid the many complications that might arise, the legislature has said that where there was no license at the time the act became a law, the county treasurer should issue no certificate, except in conformity with the vote of the people. But it is argued that at the election of excise commissioners in March, 1896, a board was elected that would have granted licenses if the old law had continued and

therefore, that vote must be construed as a vote of the people to grant licenses, and that licenses should be granted after the law took effect as well as before, and until June 30th. I can not agree with this contention. The language of the statute is, "where there is no license," and that is the test. Had the holder of the certificate proven that there were legally issued licenses or one legally issued in the town, he would be entitled to his certificate, but we cannot, upon an application of this kind go into the mental operations of the voters or the excise board. If the construction contended for is to obtain, it all lies in the minds of the excise board. The voters did not vote license or no license, but simply voted for individuals as members of the excise board, and whether license would or would not be issued depended entirely upon the will, unexpressed, and, untrammelled of the excise board. An excise board may have been elected by the voters upon the theory that no license would be granted by them, and yet no power could prevent them from issuing licenses after they had taken their office. And the reverse is equally true; an excise board may have been elected with the understanding that they would issue licenses, and yet, when they took their office may have concluded that they would not issue any, and no power could compel them to issue licenses. Hence the law has fixed a certain way; it is this:—Where an excise board has legally issued a license prior to the passage of the act, a certificate from the county treasurer may issue, and where such license has not been issued no certificate shall issue. It can be readily seen that if we were to go into the mental operation of the board of excise there would be no end of confusion, because an excise board elected not to grant licenses, might by some pique or some supposed indignity say that inasmuch as they were to be legislated out of office that they would grant licenses, and it may be that the legislature intended that the excise board should not have the power after the passage of the act, to grant licenses. At all events, the statute is not ambiguous; it is clear, and we are not compelled to resort to such methods as the undisclosed mental operations of the excise board. If it were not so the question to be tried upon each of these applications would be, not whether there was a license in the town or not, but whether the excise board had been elected with the understanding and intention that they would or would not issue licenses. Applications might just as well be made to

have certificates cancelled upon the ground that the excise board was elected with the understanding that they would not grant licenses, as that a certificate should be upheld for the reason that they were elected for the purpose of granting licenses. A great many reasons are obvious why the legislature should fix a date as arbitrary as this, beyond which no license should be granted. The fact that there was no license at the time of the passage of the act, or that there was, is all that is to be inquired into upon an application for a certificate or for the cancellation of a certificate. The words used in the statute have a clear meaning, which has been well understood for years. The language is as follows: "Provided that in any town in which, at the time this act shall become a law, there is no license, it shall not be lawful for the county treasurer, or special deputy commissioner to issue any liquor tax certificate provided for by this act." To justify us in a departure from the ordinary and well settled meaning of such a statute, viz.: that it becomes a law on the date at which it is signed by the Governor, there should be some ambiguity, but I can discover none; it is plain, and while in various ways various things are to be done at certain times, yet there is nothing in the wording inconsistent with the construction that the legislature meant to fix the time at which the act became a law; and at which a license should be issued in a town in order to entitle the holder of a license to the county treasurer's certificate. And it can readily be seen why, in the brief time that elapsed from the time it became a law until all the functions of the excise board ceased, that the powers of the excise commissioners should be restrained and abridged, and that in towns where no license had been issued prior to that time, the same status should be preserved until the people had, by their votes, sanctioned a change.

I think the certificate issued by the county treasurer was unauthorized, and should be revoked and cancelled.

Third Appellate Department, June, 1896. Reported 6 App. Div. 271.

ALEXANDER BALOGH, Appellant, v. HENRY H. LYMAN, as State Commissioner of Excise, Respondent.

Liquor Tax Law—In part a revenue law—An existing licensee can not procure an injunction to prevent its enforcement.

The complaint and affidavit made in an action brought to procure an injunction, alleged that the plaintiff was a retail liquor dealer, possessing a valid license unrevoked and unforfeited; that, under the "Liquor Tax Law" (Chap. 112 of the Laws of 1896), it was provided that the license should cease on the 30th day of June, 1896, unless he paid a further sum of money and gave a bond in double the amount of the additional payment; that if the plaintiff failed to do this and continued the business, it was made by statute the duty of the defendant to arrest, prosecute and enjoin the plaintiff from further carrying on business. The plaintiff then alleged that he would not be able to pay the tax nor to give the bond for the reason that he was largely indebted, and he further stated that the enforcement of the law would work irreparable injury to him, for which he had no adequate remedy at law, and that it would involve him in a multiplicity of actions, both civil and criminal. He further alleged that the law was unconstitutional, and asked that an injunction issue restraining the defendant from interfering with him or his business.

Held, that an injunction was properly refused;

That the 13th section of the law indicated that its purpose was, in part at least, to raise revenue to be paid in certain proportions to the State and to the towns and cities thereof;

That it was a rule of public policy that courts would not interfere by injunction to restrain the collection of a tax unless the case was brought within some acknowledged head of equity jurisprudence, nor enjoin its collection on the ground that the statute purporting to authorize the tax is invalid unless the invalidity of the statute had been previously decided;

That an injunction would not be granted to restrain the defendant and his agents from making an arrest for an alleged violation of an existing law;

That injunctions are granted to restrain the enforcement of a revenue law only in exceptional cases where such enforcement would cause a multiplicity of suits or irreparable injury, or where there exists no adequate remedy at law;

That in the present case there was no reason to suppose that more than one proceeding would be necessary to test the validity of the present law; that if the plaintiff was arrested or enjoined he would have an opportunity to be heard and to raise the question as to the constitutionality of the law, while if the defendant interfered with him in any other way an action would lie against the defendant, provided the law under which he acted was unconstitutional.

APPEAL by the plaintiff, Alexander Balogh, from an order of the Supreme Court, made at the Albany Special Term and entered in the office of the clerk of the county of Albany on the 28th day of April, 1896, denying his motion for a temporary injunction.

William B. Donihee and Charles Haldane for the appellant.

T. E. Hancock, Attorney-General, and W. E. Kisselburgh, Jr., for the respondent.

HERRICK, J.:

This is an appeal from an order of the Special Term denying a motion for a temporary injunction.

The plaintiff alleges in his complaint that he is a citizen of the United States and a resident of the State of New York. That on the 21st day of March, 1896, the board of excise commissioners of the city of New York in conformity with chapter 401 of the Laws of 1892, as amended by chapter 480 of the Laws of 1893, granted him a license to conduct the business of a retail dealer in intoxicating liquors at 103 Second avenue, in the city of New York, for which he paid the sum of \$250; that such license has never been revoked, and that the plaintiff has never done anything for which it should be forfeited. That by section 4 of chapter 29 of the General Laws, which became a law on the 23d day of March, 1896, it is provided that after the 30th day of June, 1896, the plaintiff's right to continue in the business of a retail dealer in intoxicating liquors shall absolutely cease and determine unless the plaintiff shall pay to the defendant's duly appointed deputy such further sum of money as, computed at the rate of \$800 per annum, would cover the period extending from the 1st day of July, 1896, to the 30th day of April, 1897, and shall furnish a bond in the sum of \$1,600 conditioned as required by section 18 of said law, and in case of plaintiff's failure to comply with said requirements, and continuing in such business after the 30th day of June, 1896, it is made the duty of the defendant, his deputies and special agents, to enter upon plaintiff's premises and daily arrest and prosecute plaintiff, and to procure an injunction restraining him from continuing in said business.

The plaintiff further alleges, upon information and belief, that he will not be able to pay the tax required by said law on the

30th day of June, 1896, or to furnish the bond required, and that the enforcement by the defendant, his deputies and agents, against the plaintiff, of the provisions and penalties in said chapter 29, will work irreparable injury to plaintiff, for which he has no adequate remedy at law; involving him in a multiplicity of civil and criminal actions in order to determine his rights; and further alleges, upon information and belief, that so much of section 4 of chapter 29, above referred to, as cancels, annuls and determines on the 30th day of June, 1896, the license granted to plaintiff by the said board of excise is repugnant to section 1 and section 6 of article 1 of the Constitution of the State of New York, and to section 10 of article 1 of the Constitution of the United States, and to the 14th amendment to said Constitution; and he asks relief that such portion of section 4 of chapter 29 of the General Laws be declared null and void. and that the defendant, his deputies and agents, be enjoined from in any way interfering with plaintiff in his business of a retail dealer in intoxicating liquors until after the 21st day of March. 1897. In an affidavit attached to the complaint the plaintiff reiterates the statements of the complaint and sets forth his financial condition, showing that he has no means excepting the furnishings and fixtures in his place of business and stock of goods, and that he is largely indebted thereon, and that if the provisions of the law complained of are enforced, he will be without any means to pay the tax and be left heavily in debt. There is no answer to plaintiff's complaint or affidavit upon the part of the defendant.

The act designated in the complaint as chapter 29 of the General Laws is published in the official series of the reports of the Session Laws as chapter 112 of the Laws of 1896. It will be observed that a portion of the plaintiff's complaint is his construction of the meaning and effect of section 4 of such act. The act provides for the payment of a fee by those desiring to engage in the sale of intoxicating liquors, without the payment of which such traffic is made unlawful. The 13th section provides that the moneys received under the provisions of the act shall be paid one-third "to the Treasurer of the State of New York, to the credit of the general fund, as a part of the general tax revenue of the State, and shall be appropriated to the payment of the current general expenses of the State, and the remaining two-thirds thereof, less the

amount allowed for collecting the same, shall belong to the town or city in which the traffic was carried on from which the revenues were received, and shall be paid by the county treasurer of such county, and by the special deputy commissioners to the supervisor of such town, or to the treasurer or fiscal officer of such city; and such revenues shall be appropriated and expended by such town or city in such manner as now or may hereafter be provided by law for the appropriation and expenditure of sums received for excise licenses or in such other manner as may hereafter be provided by law."

Whether we regard the law in question as strictly a tax law or not, it is evident that one of its results, if not one of its purposes, is to raise a revenue to assist in defraying the expenses of State and local government, and it is to an extent at least to be regarded as a revenue law. Therefore, the same objections apply to any efforts to stop its enforcement and prevent the collection of the revenue expected to be derived therefrom as are to be made to the enforcement of any other tax or revenue law.

The defendant is the State officer who is charged with the enforcement of this law; the method provided for its enforcement is by obtaining injunctions restraining persons who have not complied with its provisions from trafficking in intoxicating liquors, and also by causing their arrest in criminal actions for not complying with its provisions. The plaintiff is, therefore, seeking to restrain the State officer charged with enforcing a revenue or tax law from employing the means provided by the statute for the enforcement and collection of the fee or tax provided for by the law in question.

The rule is well settled that the courts will not interfere by injunction to restrain the collection of a tax, unless the case is brought within some acknowledged head of equity jurisprudence. The rule is one of public policy. (*Western R. R. Co. v. Nolan et al.*, 48 N. Y. 513; *D. & H. C. Co. v. Atkins*, 121 id. 246.)

It has been held that an injunction will not lie to restrain the collection of a tax on the ground that its assessment is illegal. (*Susquehanna Bank v. Supervisors*, 25 N. Y. 312; *Comins v. Supervisors*, 64 id. 626. See also, *Mesick v. Board of Supervisors*, 50 Barb. 190; *R., W. & O. R. R. Co. v. Smith*, 39 Hun, 332; *Matter of Bridgeford*, 65 id. 227; *Mutual Benefit Life Insurance Co. v. Supervisors*, 20 How. Pr. 416; *Betts v. City of Williamsburgh*, 15 Barb. 255.)

As stated before, the rule is one of public policy. The collection of revenue is necessary for the maintenance of the government; appropriations for the support of the State government are made in reliance upon its collection. "If there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary." (*Cheatham v. United States*, 92 U. S. 85-89. See also, *Dows v. City of Chicago*, 78 id. 108; *Hannewinkle v. Georgetown*, 82 id 547.)

It has also been held that an action to restrain a prosecution for the collection of penalties imposed by statute, on the ground that the statute is invalid, can not be maintained, unless the invalidity of the statute has previously been decided. (*Wallack v. Society*, 67 N. Y. 23.)

The injunction prayed for is that the "defendant, his deputies and agents may be enjoined from in any way interfering with plaintiff in his business of a retail dealer in intoxicating liquors carried on," etc. The only way provided by the law for such interference is by obtaining an injunction restraining the plaintiff from carrying on such business, or by causing his arrest for so doing. The relief then asked by the plaintiff in effect is to enjoin the defendant, his deputies and agents, from causing the arrest of the plaintiff for alleged violation of the law, and to enjoin them from making any application for an injunction to restrain him from dealing in intoxicating liquors.

It has been held that an injunction may not be had to restrain an officer from making an arrest for alleged violation of law. (*Davis v. American Society*, 75 N. Y. 362.)

It seems to me unnecessary to cite any authority to show an injunction ought not as a rule to be granted to restrain a person from making an application to the court to procure an injunction. An injunction to restrain the procuring of an injunction would be rather an anomalous judicial proceeding.

By a careful reading of the cases holding that injunctions should not be granted restraining the enforcement of revenue laws, it will be seen that they qualify the rule by excepting therefrom cases where the enforcement of such laws will lead to a multiplicity of suits, or where irreparable injury would result, or where the plaintiff has no adequate remedy by the ordinary process of law. Before an injunction should be granted in these

exceptional cases it should be made clearly to appear to the court that it is such an exceptional case.

The plaintiff's statement in his complaint that the enforcement of this law will expose him to a multiplicity of suits I do not think can be held to be a statement of fact, but rather of the plaintiff's conclusion, and in that conclusion I can not agree with him that such will be the necessary effect of the enforcement of the law by the defendant.

A single proceeding will test the legality of the law, and it is not to be assumed that the defendant will harass and annoy the plaintiff with unnecessary litigation.

The only way in which the plaintiff alleges that he may be damaged is by an injunction obtained against him to prevent the sale of liquors without procuring a new license or certificate, or by being arrested in criminal proceedings. Neither he nor his property can be seized, or his business interfered with except by due process of law. If proceedings are taken to procure an injunction against him he will have notice and an opportunity to be heard, and make the same contention as to the constitutionality of the law in question that he seeks to make here. A criminal proceeding can only be taken against him in a court of record (§35), where again he will have an opportunity to assert the illegality of the law, so that under the ordinary forms of procedure, both in our courts of equity and of law, the plaintiff has the means of protecting himself from injury.

If the defendant interferes with the plaintiff in any other way, to his damage, an action may be maintained against him, if the law under which he acts is unconstitutional. (*U. L. T. Co. v. Grant*, 137 N. Y. 7.)

The order denying a motion for a preliminary injunction should therefore, be affirmed, with ten dollars costs and disbursements.

All concurred in result.

Order affirmed, with ten dollars costs and disbursements.

First Appellate Department, June Term, 1896. Reported. 6 App Div. 520.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. BENJAMIN BASSETT, Appellant, v. THE WARDEN OF THE CITY PRISON OF THE CITY OF NEW YORK, Respondent.

Liquor Tax Law—Constitutionality of the provision prohibiting the giving away of food to be eaten upon premises where liquor is sold—It applied to existing licensees.

The power of the Legislature to regulate the traffic in liquor includes the power to determine the premises upon which liquor shall be sold and for what other uses the premises shall be used.

The provisions of the Liquor Tax Law, forbidding persons to give away any food to be eaten on premises where liquor is sold, are a proper exercise of this power and do not deprive such persons of either liberty or property within the meaning of the State or Federal Constitutions.

It was not the intention of the Legislature to except any class or any individual from the operation of this prohibition, and it applies to licensees whose licenses were in force when the act went into effect, and governs their conduct during the continuance of the term of such licenses.

There is nothing in any provision of sections 4, 9 and 44 of the Liquor Tax Law which relieves a licensee, holding an unexpired license at the time when this act took effect, from the operation of this prohibition during the unexpired term of such license.

APPEAL by the relator, Benjamin Bassett, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of April, 1896, dismissing a writ of habeas corpus granted in the action and remanding the relator to the custody of the respondent.

Samuel Untermeyer and Louis Marshall, for the appellant.

George Gordon Battle, for the respondent.

INGRAHAM, J.:

The relator was arrested and held for violating subdivision e of section 31 of chapter 112 of the Laws of 1896, known as the Liquor Tax Law. It is there provided that it shall not be lawful for any corporation, association, copartnership or person, whether having paid such tax or not, "to sell or expose for sale or have on the premises where liquor is sold any liquor which is

adulterated with any deleterious drug, substance or liquid which is poisonous or injurious to health, or to give away any food to be eaten on such premises." By section 45 it is provided that the act shall take effect immediately. Thus by subdivision e of section 31 the act of giving away food to be eaten on premises where liquor is sold is declared unlawful. There is no qualification to this provision, nothing to justify the court in saying that it was the intention of the Legislature to except any class or individual from the operation of this prohibition, but the plain provision is that it shall not be lawful for any one, whether having paid a tax under the provisions of the act or not, to give away food to be eaten on premises where liquor is sold.

The appellant, however, insists that certain other sections of the act indicate that it was not intended that subdivision e of section 31 should apply to those holding licenses which were in force when this act took effect, during the continuance of the term of such licenses. The three sections relied on by the appellant are sections 4, 9 and 44 of the act. By section 4 it is provided that every license granted before the passage of the act, "which is valid when this act takes effect, shall be, and remain, valid for the term for which it was granted, except as herein provided, unless sooner canceled under the provisions of the law under which it was granted, and the rights and liabilities of the holder thereof during such term shall be governed by the laws in force immediately prior to the taking effect of this act, except as otherwise expressly provided in this act, but such license shall cease, determine," etc. There is nothing in this section that prescribes what act shall or shall not be lawful for a person holding a license. It is true that the rights and liabilities of the holder of a license must be governed by the laws in force immediately prior to the taking effect of this act, but it does not say that he may do acts which are declared by the express provisions of this law unlawful. The license granted to the appellant, and which was in force at the time this act took effect, did not, directly or indirectly, either authorize him to sell or give away food or prohibit him from selling or giving away food upon the premises. He acquired no right by virtue of that license, except to engage in the sale of liquor to be drunk on the premises in the city of New York during portions of each day except Sunday; and his rights and liabilities under that license were to be governed by the law under which the license was

granted, except as otherwise expressly provided for in the new act. But whether or not an act distinct from the sale of liquor was a crime, it could hardly be said to be one of the rights or liabilities under the license, and as the statute itself expressly provided that no one should give away food upon premises where liquor is sold, it would come within its provisions as an act which was expressly prohibited.

We do not think that section 9 applies at all, as it merely refers to the duty of the special deputy commissioners in certain counties. Such special deputies are required to perform all the duties theretofore conferred upon boards of excise or excise commissioners under any law repealed by the act during the continuance of any license theretofore granted, as to the transfer, surrender or revocation thereof, or as to prosecuting offenders for violation of law under any law existing immediately prior to the passage of this act. As the boards of excise were abolished, it was made the duty of the new deputy commissioners to perform all of the duties of the old boards of excise as to crimes which had been committed prior to the passage of the act, or in violation of the laws existing immediately prior to the passage of the act in question, so far as the same should continue in force, until the licenses granted under them had expired. There is nothing that could be in any way construed as providing for what shall or shall not be lawful after the passage of the act.

The section principally relied upon by the appellant is section 44, which contains a repealing clause, by which certain acts in force for the regulation of the liquor traffic are repealed, with a saving clause regulating such repeal. The provision relied on by the appellant is: "Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is repealed, but the provisions of any such relating to the transfer, cancellation or revocation of a license, the collection of penalties or prosecutions for the violation of the law, shall continue in force as to any license which has not expired at the time this act takes effect, until the expiration thereof." There is nothing in this section, however, that determines what is or what is not a violation of law, nor is there anything limiting the express provisions of section 31, which makes certain acts therein specified unlawful.

It is true that the provisions of any law in force relating to the infliction of penalties, or to prosecutions for violations of

the law, continue in force as to any license which has not expired, but our attention is not called to any provisions of law in force at the time that either prohibited or authorized the holder of a license to give away food to be eaten on the premises upon which he carried on his business. Assuming that it was the intention of this saving clause to continue all the provisions of law as to the authority granted by the license, and as to the prohibitions contained in the existing laws in force as to any license which had not expired, the existence of such laws would not be at all inconsistent with the operation of section 31. While several of the acts therein prohibited were not illegal under the existing laws, they are declared illegal by this section; but as none of them was expressly authorized by existing laws, or came within the purview of existing licenses, the mere continuing in force of such existing laws would not be at all inconsistent with the enforcement of the prohibition contained in section 31 of the act. Reading these three sections together, the intention is clear, namely, that during the time the license was to continue the licensee was to be allowed to do what the license expressly authorized him to do, but in all other respects he was to be subject to the provisions of the act.

The relator also claims that this provision is in violation of both the State and Federal Constitutions; that it violates section 6 of article 1 of the Constitution of this State and the fourteenth amendment of the Federal Constitution, the relator claiming that, by this provision, which prevents him from giving away food to persons, to be eaten upon the premises upon which he sold liquor, he might be deprived of liberty or property without due process of law. There can be no doubt of the power of the legislature to regulate the traffic in liquor, and the power to regulate must include the power to determine upon what premises liquor shall be sold, and what other use shall be made of such premises. Neither the liberty nor property of this relator was at all interfered with by the provision prohibiting him from using the premises in which he sold liquor for the gratuitous distribution of food. He could give away all the food that he pleased at other places. Neither his liberty to do what he pleased with his food, nor his property in the food itself, or power of disposition of it, was at all interfered with. All that was included in the provision was that these premises, used at the time for the sale of liquor, whether under a license or under

the authority contained in the act for the payment of the tax, should not be used at the same time for the giving away of food to be there eaten.

It is entirely clear that this was a reasonable regulation of the use of the premises in which liquor was to be sold, and entirely within the power of the legislature.

Our conclusion is, therefore, that the order appealed from should be affirmed, with costs.

WILLIAMS, O'BRIEN and PATTERSON, JJ., concurred; VAN BRUNT, P. J., dissented.

Order affirmed, with costs.

U. S. Circuit Court, Northern District of New York. Reported. 74 Fed. Rep. 765.

WILLIAM J. KRESSER v. HENRY H. LYMAN, as State Commissioner of Excise.

WALLACE, Circuit Judge.

The plaintiff having brought suit to restrain by permanent injunction the enforcement of the provisions of the act of the Legislature of the State of New York, approved March 23, 1896, entitled "An Act in relation to the traffic in liquors, for the taxation and regulation of the same, and to provide for local option," commonly known as the Raines Law, has applied for an injunction *pendente lite*. His action proceeds upon the theory that the license granted to him February 10, 1896, in consideration of the payment of \$200, for the term of one year from that date, by the board of excise of the city of Albany, pursuant to authority conferred upon them by chapter 401 of the Laws of the State of New York of 1892, entitled: "An Act to revise and consolidate the laws regulating the sale of intoxicating liquors," is a contract investing him with the right to conduct the business of a retail dealer in spirituous liquors, wines, ale and beer, at the place specified, until the expiration of the term; and that those provisions of the act of 1896 which declare that every license heretofore lawfully granted by a board of excise "shall cease, determine and be void after June 30, 1896," and whereby he and others similarly situated are required to make application for a liquor tax certificate and pay

a tax at the rate of \$500 per annum from July 1, 1896, and in case of default are liable to arrest by the defendant as State Commissioner of Excise, and to fine and imprisonment, are repugnant to the Constitution of the United States, and as to him are void as impairing the obligation of a contract and depriving him of his property without due process of law.

The conclusion that these provisions are not obnoxious to the Constitution seems so plain that the objection urged in behalf of the defendant that no special circumstances appear bringing the case within any of the recognized exceptions to the rule that a court of equity will not interfere by injunction to prevent the collection of a tax merely upon the ground of its illegality, or because the statute under which it is imposed is unconstitutional, will not be considered.

The argument for the plaintiff, deduced from a consideration of the various provisions of the pre-existing statutes that the license granted to him is a contract which can not be destroyed or impaired by subsequent legislation by the State and the privilege conferred by it a property right of which he cannot be deprived without due process of law, and just compensation, necessarily assumes the competency of the State through its legislature and administrative officers to enter into a contract hampering the future action of the State in the exercise of its police power to regulate, restrict or prohibit the traffic in intoxicating liquors. If this competency is wanting no form of words, whether expressed in a legislative act, or otherwise, can create a valid contract. That the State can not barter away or in any manner abridge any of those inherent powers of government the complete and untrammelled exercise of which is essential to the welfare of organized society, and that any contracts to that end are void upon general principles, and can not be protected by the provisions of the national Constitution, are propositions which are abundantly settled by the decisions of the highest federal tribunal. Without attempting an extended reference to these adjudications it will suffice to refer to two decisions of the Supreme Court of the United States. In *Beer Company v. Massachusetts* (97 U. S. 25), the question was, whether under the prohibitory liquor law of Massachusetts of 1869, the seizure and forfeiture of liquors belonging to the company was lawful in view of the charter of the company granted by legislative act in 1828, investing the company with the right to manufacture and sell

such liquors; the contention being that the subsequent act impaired the obligation of the contract contained in the charter and was void so far as the liquors in question were concerned. The court in deciding against this contention declared the principles that all rights are held subject to the police power of a state, and if the public safety or the public morals require the discontinuance of any manufacture or traffic, the legislature may approve accordingly, notwithstanding individuals or corporations may thereby suffer inconvenience; and that as the police power of a state extends to the protection of the lives, health and property of her citizens, the maintenance of good order and the preservation of the public morals, the legislature can not by any contract divest itself of the power to provide for these objects. The Court said: "The plaintiff in error boldly takes the ground that, being a corporation, it has a right by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The Legislature had no power to confer any such rights." In *Stone v. Mississippi* (101 U. S. 814), the Legislature of Mississippi had granted a charter to a lottery company in consideration of a stipulated sum in cash, and annual further payments and during the life of the charter the State adopted a new constitution prohibiting the sale of lottery tickets or the drawing of any lottery theretofore authorized; and the question was whether the rights and franchises of the lottery company were impaired by the new constitutional provision and an act of the legislature to effectuate it prohibiting all kinds of lotteries within the State and making it unlawful to conduct one. The Court said: "If the Legislature that granted this charter had the power to bind the people of the State and all succeeding Legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contracts existed therefore, or not, depends on the authority of the Legislature to bind the State and the people of the State in that way. All agree that the Legislature can not bargain away the police power of a State. Irrevocable grants of property and franchises may be made if they

do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

The regulation of the liquor traffic is an exercise of the police power of the State for the prevention of intemperance, pauperism and crime. The courts have sanctioned the validity of most stringent statutes enacted in that behalf, such as those which declare the liquor kept for sale a nuisance, which authorize its condemnation and destruction, and which provide for the seizure and forfeiture of the building in which it is sold. Speaking of such statutes, Judge Cooley uses the following language: "Perhaps there is no instance in which the power of the Legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the legislature then steps in, and, by an enactment based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand. Even the keeping of that, for the purpose of sale, becomes a criminal offense; and, without any change whatever in his own conduct or employment, the merchant of yesterday becomes the criminal of to-day, and the very building in which he lives and conducts the business which to that moment was lawful, becomes the subject of legal proceedings if the statutes shall so declare, and liable to be proceeded against for a forfeiture. A statute which can do this must be justified upon the highest reasons of public benefit; but whether satisfactory or not, the reasons address themselves

exclusively to the legislative wisdom." Cooley's Constitutional Limitations, p. 720.

The Court of Appeals of this State in *Metropolitan Board of Excise v. Barrie* (34 N. Y. 659) in considering the general question now involved declared: "These licenses to sell liquor are not contracts between the State and the persons licensed, giving the latter vested rights protected on general principles and by the United States Constitution against subsequent legislation, nor are they property in any legal or constitutional sense. They have neither the qualities of a contract or of property, but are merely temporary permits to do what otherwise would be an offense against a general law. They form a portion of the internal police system of the State, are issued in the exercise of its police powers, and are subject to the direction of the State government, which may modify, revoke or continue them as it may deem fit."

It is urged for the plaintiff that the act of 1896 is not a police regulation, but is a taxing act, but the contrary has been decided by the Court of Appeals in the recent judgment in *People v. Murray*. The Court said: "The character of the act of 1896, whether a tax law in a proper sense, or a law enacted under the police power, must be determined from its whole scope and tenor, and there can be no reasonable doubt, we think, that it is of the latter character."

For these reasons, the conclusion is reached that, notwithstanding his license, the plaintiff would be without remedy if the legislature had absolutely prohibited the sale of liquors in this State after the 30th day of June. Instead of doing this, it has required him after that date to conduct his traffic under precisely the same conditions which are prescribed for all others, but for the purpose of saving his rights and those of others similarly situated, has authorized a recovery from the town or city in which the license was granted of such proportion of the whole license fee as the remainder of the time for which said license would otherwise have run bears to the whole period for which it was granted. He has no just ground for complaint.

The motion is denied.

Supreme Court, Kings Special Term, July, 1896. Reported 18 Misc. 341.

**Matter of the Application of CHARLES RITCHIE for Revocation of
Liquor Tax Certificate of ADOLPH SAMUELY.**

Excise—Consent of owners of neighboring dwellings—Exception.

An abandonment of premises by the person who carried on a liquor business thereon at the time the Liquor Tax Law took effect deprives the premises of their privileged character under the exception in subdivision 8 of section 17 of said act, and a subsequent applicant for a certificate must obtain the consents of two-thirds of the owners of dwellings situated within 200 feet.

APPLICATION by Charles Ritchie for revocation of liquor tax certificate.

Backus & Manne (H. Manne, of counsel), for petitioner.

John M. Wald, for deputy commissioner of excise.

J. S. Fisher, for respondent.

OSBORNE, J. The petition herein shows, and it is admitted, that at the time of the passage of chapter 112 of the Laws of 1896, on March 23, 1896, known as the "Liquor Tax Law," one Philip Basler conducted the liquor business at No. 108 Union avenue, under a license issued to him by the board of excise of the city of Brooklyn; that on or about April 10, 1896, said Basler gave up the liquor business, moved away from said premises, and the same remained vacant during the months of April, May and up to June 16, 1896; that on the last-named day one Adolph Samuely, the above-named respondent, made application to Special Deputy Michell for a liquor tax certificate to carry on the liquor business on said premises, and the same was issued to him on June 23, 1896. The petitioner here seeks to have said certificate revoked and canceled on the ground that there were buildings occupied exclusively as dwellings within two hundred feet of said premises, and that said applicant had not obtained the consent of two-thirds of the owners of such buildings, as provided by section 17, subdivision 8 of the Liquor Tax Law. The language of said subdivision 8 of section 17 as to issuing liquor

tax certificates to permit the traffic in liquors within two hundred feet of a building or buildings occupied exclusively for a dwelling or dwellings is substantially the same as in the Excise Law of 1892. Chap. 440, § 43, Laws 1892, as amended by chap. 480, Laws 1893.

In the law of 1896 it is provided that consent of two-thirds of the owners of dwelling-houses within two hundred feet of the place where the traffic in liquor is to be carried on shall first be obtained, "except that such consent shall not be required in cases where such traffic in liquor is actually lawfully carried on in said premises so described in said statement when this act takes effect." The prohibition in the law of 1892 forbade the granting of a license to sell liquor in any building within two hundred feet of a church or schoolhouse, "and for which a license does not exist at the time of the passage of this act." This section of the Excise Law has been construed by the Court of Appeals in *People ex rel. Cairns v. Murray*, 148 N. Y. 171; 42 N. E. Repr. 584; and that court held that "when the licensee, who was then established when the law took effect, abandoned the business, the prohibition became absolute as to all new applicants." I think that the reasoning by which the Court of Appeals arrived at its conclusion in the Cairns case is equally applicable in construing subdivision 8 of section 17 of the Liquor Tax Law. The object sought to be attained was to prevent the carrying on of the liquor business within two hundred feet of buildings occupied exclusively as dwellings, without the consent of two-thirds of the owners thereof; and, while the purpose of the legislature was to protect parties established in business within the prescribed limit at the time the act took effect, such protection was only intended for those parties who were then actually established in business within the prescribed limits. When those parties abandoned such business location, no right or franchise remained in the premises themselves, but the prohibition became absolute as to any new applicants, in the absence of the statutory consent. To hold otherwise would have an effect different from what the legislature plainly intended.

The prayer of the petitioner must be granted.

Ordered accordingly.

Supreme Court, Erie Special Term, July, 1896. Reported. 18 Misc. 343.

THE PEOPLE ex rel. JOHN SWEENEY v. JOHN C. LAMMERTS, as
County Treasurer.

1. Excise—Effect of discontinuance of liquor business on premises.

The exemption from the requirements of the statute as to consents given by the Liquor Tax Law to premises on which the liquor business was actually carried on at the time the act took effect is lost by a subsequent discontinuance of such business and abandonment of the premises, no matter for how short a time.

2. Same—Neighborhood of church.

The mere fact that a lot owned by a church society and upon which the foundation walls of a church have been laid stands within 200 feet of the place for which the certificate is sought, does not bring it within the prohibition of subdivision 2 of section 24 of the statute.

CERTIORARI to review the determination of John C. Lammerts, as county treasurer of the county of Niagara, in refusing to issue a liquor tax certificate to relator.

Augustus Thibaudeau, for plaintiff.

George W. Knox, for defendant.

TITUS, J. The questions here presented arise on the petition of the plaintiff for a writ of *certiorari* to John C. Lammerts, as county treasurer of Niagara county, and his return thereto. From these papers it appears that the premises known as "601 Main street, Niagara Falls," have been for a number of years last past occupied for the purpose of carrying on the business of a retail liquor dealer, and the person so occupying such premises was regularly licensed by the board of excise of the city of Niagara Falls, and that this was the situation on the 23d day of March, 1896, when chapter 112, entitled "An Act in relation to traffic in liquors," was passed. At that time the premises were owned by Ellen Hawley, and were occupied by Thomas W. Mingay, who held the license and carried on the business. That he continued to carry on that business and occupy the premises until about the 2d of April last, when for some reason he abandoned the premises. That thereafter an arrangement was made between him and the landlord by which he resumed his

business, and continued therein until the 11th day of June following, when he abandoned the business of saloon-keeping, and quit possession of the premises. That thereafter, and on the 12th day of June, 1896, as appears from the petition, Sweeney, the relator, leased the premises from Ellen Hawley, the owner, for the purpose of carrying on and conducting a saloon and retail wine and liquor business. That the relator has entered into agreements for the fitting up of the place as a saloon and is ready to enter upon said business whenever he can procure a liquor tax certificate of the defendant, required by chapter 112 of the Laws of 1896, known as the "Liquor Tax Law." That, on or about the 15th day of June, Mingay, the licensee, applied to the defendant, Lammerts, county treasurer of Niagara county, for permission to transfer his license to John Sweeney, the relator. That the defendant, Lammerts, would not transfer said certificate without the consent of two-thirds of the owners of dwellings within the prescribed limits being executed and filed as required by the statute, and nothing further was done thereunder, and the license expired by limitation on June 30th. On the 30th day of June the plaintiff made an application for a liquor tax certificate, accompanied by the statement required by the act, and gave the required bond, and offered to pay the defendant the amount to which he would be entitled for the balance of the year. That the defendant, Lammerts, refused to give the tax certificate, placing his refusal upon the grounds that the place for which the liquor tax certificate is asked is within two hundred feet of property owned by a church association, and upon which there is a church in process of erection, and that the place for which the liquor tax certificate is asked is within two hundred feet of the nearest entrance to buildings occupied exclusively for dwellings, and the owners' consents not having been obtained and filed as required by law.

It is undisputed that, within two hundred feet of the premises where the business is proposed to be carried on, there are a number of buildings occupied exclusively for dwellings and the consents of the owners of such buildings have not been obtained. It is also undisputed that on the same street, and opposite, within two hundred feet, is a piece of property belonging to a church society; that no building has been erected, but a church edifice has been commenced, and the foundation walls have been

laid, and at the time of this application, and for some time previous, work on the building was and had been suspended. It is now claimed by the plaintiff that, inasmuch as the premises where the business is proposed to be carried on were at the time of the passage of chapter 112 occupied as a place where traffic in liquor was actually lawfully carried on, he is not required, under the exception to subdivision 8 of section 17 of the act, to procure the consent of two-thirds of the owners of such buildings, and that the prohibition contained in subdivision 2 of section 24 with reference to buildings occupied exclusively as a church has no application to the facts in this case. Section 11 provides: "Excise taxes upon the business of trafficking in liquors. Excise taxes upon the business of trafficking in liquors shall be of four grades, and assessed as follows:"

This section then goes on to provide what tax shall be imposed upon the business in the different cities of this State. If the language of the law is to be taken literally, the tax is upon the business of the person, and not a license to the person, as was the case under the law of 1892, which required the applicant to be a person of good moral character; and this language is employed through all of the sections of this statute — "a tax upon the business" — and is nowhere called a license of the business, or to the person. It is provided by subdivision 8 of section 17 that: "When the nearest entrance to the premises described in said statement as those in which traffic in liquor is to be carried on is within two hundred feet of the nearest entrance to a building or buildings occupied exclusively for a dwelling, there shall also be so filed simultaneously with said statement a consent, in writing, that such traffic in liquors be so carried on in said premises during a term therein stated, executed by at least two-thirds of the owners of such buildings within two hundred feet so occupied as dwellings, and acknowledged as are deeds entitled to be recorded, except that such consent shall not be required in cases where such traffic in liquor is actually lawfully carried on in said premises so described in said statement when this act takes effect."

Section 24 of the act declares: "Place in which traffic in liquor shall not be permitted. Traffic in liquors shall not be permitted * * * (2) Under the provisions of subdivision 1 of section 11 of this act, in any building, yard, booth or other place which shall be on the same street or avenue, and within

two hundred feet of a building occupied exclusively as a church or a schoolhouse. * * * Provided, however, that this prohibition shall not apply to a place which is occupied for a hotel, nor to a place in which such traffic in liquors is actually lawfully carried on when this act takes effect; nor to a place which at such date is occupied or in process of construction by a corporation or association which traffics in liquors solely with its members."

By section 43 of chapter 401 of the Laws of 1892 it was provided that: "No person or persons who shall not have been licensed prior to the passage of this act shall hereafter be licensed to sell strong or spirituous liquors, wines, ale and beer in any building not used for hotel purposes, and for which a license does not exist at the time of the passage of this act, which shall be on the same street or avenue and within two hundred feet of a building occupied exclusively for a church or a schoolhouse."

It was held by the Court of Appeals in *People ex rel. Cairns v. Murray*, 148 N. Y. 171, that this section was a prohibition against any person selling liquors in such a place unless the party applying for a license was the same person who had a license, and had occupied the proscribed premises, at the time of the passage of this act. But the legislature, by the act of 1896, seems to have purposely changed the reading of this provision of the law. The language is significant. It reads: "Place in which traffic in liquors shall not be permitted. Traffic in liquors shall not be permitted," etc.

This section is a substitute for section 43 of the act of 1892, which the Court of Appeals, in *People ex rel. Cairns v. Murray*, *supra*, had under consideration; and it is manifest that the change made by the legislature was not accidental, but for the purpose of extending the proviso to the premises which had at the time of the passage of the act been occupied for the sale of liquor. It seems to me it would be doing violence to language to hold that under this section, as it now stands, the only person who occupied the premises under a license at the time the act went into effect could, at that place, carry on the liquor traffic. The provisions of subdivision 8 of section 17, above quoted, were not contained in the act of 1892; and the language used in the exception in this subdivision, relating to places within two hundred feet of a building occupied exclusively for a dwelling, is substantially the same as is used in the proviso

contained in section 24, relating to churches and schoolhouses, and should have, in my opinion, the same construction.

If I am right in the construction I have placed on this section, then it would not be necessary to procure the consent of two-thirds of the owners of buildings occupied exclusively for dwellings, nor would the provision prohibiting such traffic within 200 feet of a church have any application to this case; for it is undisputed that at the time chapter 112 became a law the premises in question were occupied as a saloon, and traffic in liquors was then actually carried on in that place. Had such traffic been continued down to the time of this application, the relator would be entitled to the relief which he now seeks. It does not seem to me, however, that the conceded fact that a church society owns property within 200 feet, upon which no building has been erected, is within the prohibition. The language of the statute is "within 200 feet of a building occupied exclusively as a church," and, as there is no building there, it can not be, and is not, occupied as a building for a church, and hence the language of the statute has no application to a case of this kind. It is undisputed that Mingay quit the business of selling liquor at this place on the 11th day of June, and no business has been carried on in the premises since that time. The plaintiff claims that he leased the premises of the owner, and intends to carry on the business, if he can procure a tax certificate from the defendant, and that the reason he has not occupied the premises since June 11th is that he could not procure the transfer of the former occupant's license, and that he has, in fact, been in possession of the premises, it should be considered as still a place where liquors are sold. Mingay quit the business June 11th, and made application for a transfer of his license on June 15th. There is, concededly, a time when no person had any license, except Mingay, to carry on the liquor business. I can see no reason why a liberal construction should be given to the restrictive provisions of this act. It was probably intended by the legislature to reduce the number of places in which the liquor traffic was carried on, and to increase the revenues by increasing the tax for doing business, and, in a measure, protect dwellings, schools, and churches from surroundings dangerous to good morals, and tending to disturb the peace and quiet of the neighborhood, by limiting and prohibiting the places where such traffic may be carried on, and the court always furthers the effort of

the legislature by giving the statute such a construction as will carry out the legislative intent; and I am constrained to hold, therefore, that, as the business of trafficking in liquors was not continued after the 11th day of June, there was an abandonment of the premises for that purpose, and before the liquor business can again be carried on in these premises, the party applying for a tax certificate must comply with the provisions of the act, by procuring the consent of two-thirds of the owners of buildings occupied exclusively for dwellings, as provided by subdivision 8 of section 17.

A case somewhat analogous has been recently passed upon by the Supreme Court of Kings county, in the matter of the application for the revocation of the liquor tax certificate issued to Adolph Samuely, *ante*. It appeared that, at the time of the passage of the act, one Basler conducted a liquor business at 108 Union avenue, under a license obtained from the board of excise of the city of Brooklyn; that on April 10, 1896, he gave up the liquor business, and moved away from the premises, and the same remained vacant until June 16, 1896, when Samuely made application and received a liquor tax certificate to carry on the business. An application was then made to the court to cancel the license on the ground that Samuely had not gotten the consent of two-thirds of the owners of the buildings, exclusively used as dwellings, situated within 200 feet of such place of business, as required by subdivision 8 of section 17 of the act. It was there contended that inasmuch as the premises were, at the time of the passage of the act, occupied as a place where liquors were sold, it was not necessary, under the exception contained in subdivision 8, to procure the consent of the owners of buildings used as dwellings. The court held that, when such premises were abandoned by the party occupying them at the time of the passage of the act, no right or franchise remained in the premises themselves. While the learned judge seems to take the view that the premises can not be occupied by any other than the person holding the license at the time the act took effect, the case is authority upon the question that, when the place has once been abandoned, it loses its privileged character which the act gave it, and must be treated as any other place where this business is sought to be carried on, and falls within the prohibition of the statute.

I am, therefore, of the opinion that there was an actual

abandonment of the business and the premises by the licensee, and that after such abandonment, no matter how short the lapse of time, the privilege attaching to such a place, under the statute, has been lost, and the party asking for a liquor tax certificate must conform to the requirements of subdivision 8 before he is entitled to such certificate. It follows, therefore, that this writ must be dismissed, with costs to the defendant.

Writ dismissed, with costs.

Supreme Court, Onondaga Special Term, July, 1896. Unreported.

In the matter of the application of Clarence M. Keene to revoke a liquor tax certificate of John A. Toole.

MCLENNAN, J. On May 2, 1896, John A. Toole was the lessee of the premises known as Elmwood Park, situate at Elmwood, in the town of Onondaga consisting of about seventeen acres of land. The owner and lessor of the park was Mrs. Ann McGrory, the wife of William McGrory, sometimes called "McGlory." The main entrance to Elmwood Park is about four hundred feet from Cortland avenue, and is reached from Cortland avenue by a driveway or lane; and at Cortland avenue there is a sign over such driveway indicating that it is the entrance to Elmwood Park, and there is also a similar sign at the entrance to the park proper.

There are places in said park that are situate within two hundred feet of dwelling houses; other places, and the greater portion of the park, are not within such close proximity to houses occupied as dwellings.

At the time the application in question was made Elmwood Park was well known both as to its location and character, and as to its general surroundings. On the day the application was made, May 2, 1896, John A. Toole had the consent of the lessor, Mrs. McGrory to sell liquor in Elmwood Park which at that time was owned by her. He, therefore, at the time was entitled to demand and receive upon filing such consent of his lessor a license to sell liquor at any place in said park, which was at least two hundred feet distant from any residence. Under the law in

question, no question could be raised as to his character, and no question could be raised as to whether or not he was a suitable person to engage in such business. He was entitled to demand a license for such purpose, upon properly describing the place where he wished to sell liquor, upon paying the fee required and filing the consent of his lessor, provided such place was not nearer than two hundred feet from the nearest place of residence.

Upon the day in question, May 2, 1896, he filed his application and stated that the park was located upon Cortland avenue, Elmwood, town of Onondaga. The certificate, issued at the same time by the county treasurer, described the place as "Elmwood Park, Elmwood, N. Y." It is urged on the part of the petitioner that because Elmwood proper does not border upon Cortland avenue, although its main entrance is from such street, that this was a material false statement. We think not. No one, as appears from the evidence, was misled or deceived. It was perfectly understood where the liquor was intended to be sold and for what place the certificate was intended to be granted. The certificate issued at the very time the application was presented states that it is for Elmwood, N. Y. It would be idle to say that the description given in the application was materially false within the meaning of the statute.

It was stated in the application that at the time of the passage of the law known as the Raines Law the traffic in liquor had been carried on at the place in question. This statement was undoubtedly untrue, as appeared by the evidence; but it is quite reasonable to suppose from the evidence that Mr. Toole believed it at the time to be true. A government license had been issued for the sale of liquors at this place and the board of excise of the town of Onondaga had assumed, under very questionable methods, to issue a license. It appears, uncontradicted, that at the place in question, whiskey bottles and other appliances for carrying on trade were in view during a portion of the last year, but whether or not such traffic in liquor had been carried on is not material, for the reason that if it had not been so carried on Mr. Toole was required only to have filed with the county treasurer the consent of Mrs. McGrory, which, as appears by the evidence, he then had in his possession. There being afterward a question raised as to whether or not liquor had been previously lawfully sold in the park, such consent of Mrs. McGrory was filed with the county treasurer and is produced in court. The court would have

power, and it would have been the duty of the court, to have ordered it filed as of that date upon a proper application.

It is urged that Mr. Toole also should have filed a consent of the residents who are within two hundred feet of any portion of the park. It cannot be assumed that under the liquor tax referred to it is proposed to sell liquor where by the statute it is unlawful to sell it, when, as before stated, it may be lawfully sold in a great portion of the park and at a distance of more than two hundred feet from any residence property; in fact, the evidence discloses that it is proposed to sell at a place more than four hundred feet distant from any place of residence. As before suggested, on the 2d day of May, 1896, Mr. Toole was entitled to a license to sell liquor at Elmwood Park, provided he described the place where he wanted to sell with sufficient definition to meet the requirements of the statute, and provided such place was not nearer than two hundred feet from any residence, upon filing the consent of his lessor, Mrs. McGrory. Upon any rule of construction of contracts it would be held that he did all that was necessary so far as appears by the evidence in this case. He stated that Elmwood Park was on Cortland avenue. The main entrance to the park is from Cortland avenue. The consent of Mrs. McGrory he had in his possession at the time and afterward filed it with the County Treasurer. As a matter of fact, he proposes to sell liquor at a place more than 200 feet distant from any private residence and in Elmwood Park. The law will not presume that the certificate was issued to authorize him to sell at a place within 200 feet from private residences rather than at a place where he is authorized under the law to sell. The grounds for asking the revocation of the license are in every sense technical and the court would not be justified, by virtue of its decision, in imposing the severe penalty provided by the statute under such circumstances.

The application is denied without costs to either party as against the other and judgment may be entered accordingly.

Columbia County Court, July, 1896. Unreported.

THE PEOPLE ex rel. JAMES HARTIGAN, v. GEORGE H. MACY, County Treasurer of the County of Columbia.

CERTIORARI to compel county treasurer to issue liquor tax certificate.

A. B. Gardenier, for relator.

Mark Duntz, District-Attorney, for defendant.

LONGLEY, Co. J. The relator, a hotel-keeper within the county of Columbia, on the 1st day of May, 1896, applied to the defendant, as county treasurer of said county, for a liquor tax certificate. The application was refused by the county treasurer, and the relator obtained a writ of certiorari, under section 28 of chapter 112 of the Laws of 1896.

It is conceded by the return to the writ and by the district-attorney, appearing for the defendant upon this hearing, that the relator's application in form met all statutory requirements; that the bond which he filed with his application was a proper bond and was approved as to form and sufficiency by the county treasurer; that the relator, at the time he filed his application, paid the proper tax required by law. But the county treasurer in his return states that the reason why he refused to issue a tax certificate to the relator was because the place where the relator proposed to carry on the liquor traffic was less than half a mile from the county poorhouse, and says that he believed such was the fact notwithstanding the applicant's sworn statement to the contrary contained in the application; because, as he says, of his own knowledge of the locality and of information obtained by him after the application was made.

If, in fact, the relator's proposed place of business was less than half a mile from the county poorhouse and situated in a town and outside the limits of an incorporated village or city, he was not under section 21 of said act, legally entitled to receive the certificate for which he applied, and if that fact was properly and legally made to appear to the county treasurer at the proper time, that officer refused the application for a good and valid

reason and upon a return sufficiently showing the facts, his action should be sustained.

It is to be noticed that the reasons assigned by the county treasurer for his refusal to issue a certificate attached by him to the application and certified in his return to this writ, are defective in not stating that the proposed place of business, if within half a mile of the proposed poorhouse, is outside of a city or an incorporated village.

But the real question with which I am confronted is this: Has the county treasurer any judicial or discretionary power which authorizes him to refuse to grant a certificate in a case where the preliminary statutory requirements have been complied with?

It seems to me that the scheme of the statute discloses no purpose on the part of the legislature to clothe county treasurers in this matter with other than ministerial powers. If it was the design of the framers and makers of this law to vest in county treasurers judicial functions, giving them the power to determine on evidence whether or not the applicant for a liquor tax certificate was on the true facts of the case entitled to receive such certificate, the language of the act is singularly inapt and inadequate; inapt — because the statute in terms expressly provides that the county treasurer shall examine the application and bond to see if they are “correct in form” (§ 18); inadequate — because no provision is made for taking evidence or hearing proofs, but, on the contrary, on payment of the tax, if the application and bond are found correct in form and the sureties on the bond are approved by the county treasurer, he is “at once to prepare and issue” the tax certificate (§ 19). No provision is made in the statute whereby the allegations of the application may be supported by the applicant by either affidavits or witnesses. He has no notice that the truth of his statements is challenged. He has no hearing after his application is filed, and not only is there no provision in the law by which county treasurers may investigate the truth or falsity of the applicant’s answers to the statutory questions contained in the printed form for applications, but no provision is made for the court to receive evidence by affidavits or otherwise upon the return to the writ. These omissions are emphasized in importance by the fact that in a case where the county treasurer grants the certificate any citizen may bring his action up for review and ask “for an order revoking and cancelling such certificate, upon the ground that

material statements in the application of the holder of such certificate were false"; when the whole case is open upon the merits for trial before the referee or court upon proofs to be presented.

If county treasurers may simply assign a statutory reason for refusing to issue a certificate, without any investigation to ascertain whether such reason in fact exists, and against the sworn statement of the applicant, it must be confessed that the statute is well calculated to make the issuing of a certificate a mere matter of favoritism.

But a careful examination of the statute in my mind makes clear an altogether different purpose. I think the legislature intended not to create a judicial tribunal out of the office of county treasurer, but in the administration of this law to keep county treasurers as far as possible within their normal and legitimate functions as simple receivers of taxes.

I think that the necessary facts to entitle an applicant to receive a tax certificate are to be presented to the county treasurer by the sworn statement of the applicant contained in his answers to the statutory questions in the printed form of application; that the county treasurer is required, before issuing a certificate, to examine the application and see that the statements necessary to make out a case for a certificate to issue are all there and formally and correctly made, and that when he finds the application correct in form and receives from the applicant a sufficient bond, together with the amount of tax required, he has then no alternative but to obey the explicit command of the statute and "at once" — without waiting for or receiving any further or subsequent information — issue his certificate.

If I am right in the view I take of the statute, the county treasurer in this case should have obtained no information, as he says he did, "subsequent" to receiving the application; he should have acted immediately. Neither was he at liberty to act upon his own knowledge of the locality. He had no discretionary or judicial powers in the premises. It was his duty to examine the papers presented and if he found that these were correct in form, and if he approved the bond, then all the preliminary statutory requirements had been complied with and he had only the simply ministerial duty to perform of receiving the tax and issuing his certificate.

My confidence in the correctness of the views here expressed is

very much strengthened by a remark made by Mr. Justice Davy, of the Supreme Court, in deciding at Special Term, the case of *People ex rel. Rochester Whist Club v. Hamilton*, 17 Misc. Rep. 11. In the opinion, at page 12, he says: "It is hardly necessary in this case to discuss the discretionary power that is vested in the county treasurer, under the statute, to grant or refuse a liquor tax certificate. I am inclined to think, however, that if any person applies for such a certificate and brings himself squarely within the terms of the law by complying with all the statutory preliminaries, that the certificate cannot legally be withheld."

The conclusion I have reached requires that the application to compel the county treasurer to issue a liquor tax certificate to the relator must be granted.

Supreme Court, Delaware Special Term, August 1896. Unreported.

PEOPLE ex rel. WILLIAM FULLER v. JOHN S. ELLES.

LYONS, J. The case of the *People ex rel. Thomas v. Sackett*, decided at the St. Lawrence Special Term and to be reported in vol. 17, Misc. Reports, is decisive of this application, and an order must, therefore, be granted directing the issuing of the writ of mandamus asked for; but inasmuch as the defendant has concededly acted in good faith throughout, and has justly had reason to doubt his legal right to cause notice of a special town meeting to be given, I think he ought not to be charged with costs. An order in accordance with the foregoing memorandum may be prepared.

Supreme Court, St. Lawrence Special Term, August, 1896. Unreported.

In the matter of the application of George W. Aldous to revoke the liquor tax certificate of Lucy A. Goodwin.

RUSSELL, J. The consent of William H. Allen, who as was claimed occupied exclusively for a dwelling premises within two hundred feet of the hotel for which a tax certificate was asked,

was necessary under the present law to justify the issuing of a liquor tax certificate. From the evidence taken before the referee, grave suspicions arise that Allen, in making his comparatively large additions and alterations, had in contemplation the project of using the building when repaired for a hotel, which would have destroyed its occupation exclusively as a dwelling house. If his rebuilding and declarations of possible intent had been followed by an overt act of use as a hotel, the evidence would have been sufficient to have justified the finding that the alterations were begun for that purpose and that the dwelling house character of the building was destroyed. But that one overt act is lacking, and mere declarations of intent, more or less indefinite, will not suffice to destroy the right of the owner of the certificate, for which she has paid a considerable sum, to claim its validity, especially when Allen himself testifies upon the stand that he did not really intend to use the building as a hotel, but intended to continue its character for the purpose for which it has been always used, which was that of a dwelling house. This testimony of his would have a serious effect upon any application which he might make for a certificate claiming that the building is now a hotel. In view of all the facts and circumstances of this case the application to revoke the license of Mrs. Goodwin must be denied.

Supreme Court, Westchester Special Term, September, 1896. Unreported.

PEOPLE ex rel. MARTIN ANDERSON v. JOHN HOAG, as County Treasurer.

KEOGH, J. The County Treasurer has no power to try an issue of fact. When the application conforms to the provisions of the statute, he has no discretion, and is bound to issue the certificate. In this case, the applicant did not comply with the requirements of the statute.

The application is denied.

County Court, Seneca County, October, 1896. Unreported.

PEOPLE ex rel. MARTHA E. ACTION v. MAYNARD T. CORKHILL.

Proceedings instituted by certiorari to compel the County Treasurer of the County of Seneca to issue a certificate under what is termed the Raines Law to Martha E. Action.

Daniel Moran, attorney for relator.

Samuel H. Salisbury, attorney for treasurer.

RICHARDSON, Co. J. On the 28th day of September, 1896, Martha E. Action (the relator), applied to the treasurer of the county of Seneca for a liquor tax certificate; the application was refused and the relator herein obtained this writ of certiorari.

Upon the return of the writ properly served, the attorneys for the respective parties admit that said relator, Martha E. Action, is the owner of the building and premises in which she seeks to obtain a certificate to sell liquors, and that she occupied the same as a hotel and lawfully conducted the sale of liquors on said premises when said Raines Law took effect, and that said premises are situate within one-half mile of Willard State Hospital.

The office of a writ of certiorari is to correct errors; therefore, I can not consider said admissions even if they are pertinent to the subject at issue.

The return of the treasurer to the writ is quite lengthy, but the reasons therein assigned for refusing the certificate are, "I further certify and show to this court that from the statements made to me by the husband of the petitioner herein, the buildings and premises occupied by her in which she applied to carry on the business of trafficking in liquor was and is situated just across the road from the Willard Insane Hospital and therefore directly within the prohibition contained in subdivision 1 of section 24 of the Liquor Tax Law; that there are two or three other parties upon this same road and situate in the same manner as regards the said hospital, who applied for a certificate to sell liquor under subdivision 1, of section 11 of the Liquor Tax Law. That in view of the importance of this question and of the fact of the uncertainty as to my duty under the law, and of the people, wards of the State, that would be affected by the adoption of the rule con-

tended for by the petitioner, I considered it my duty to decide as I have and so leave it until the legal question shall be settled by some decision of the court. I applied to and took counsel of several attorneys upon the question involved in this case and followed the advice given me in regard to the matter and should consider it an omission of my duty as a public officer to have followed any other course than the one pursued by me. Hereto annexed and marked "A" and "B" respectively, are copies of the statement of applicant with reasons for adverse decision attached and bond of applicant."

The reason for said adverse decision reads as follows:

"Office of M. T. Corkhill,
Seneca County Treasurer.

Seneca Falls, N. Y.
Sept. 28, 1896.

I hereby refuse to grant a liquor tax certificate to the within applicant because she is within the prohibition of subdivision 1 of section 24 of the Liquor Tax Law."

"M. T. CORKHILL, County Treasurer."

Said treasurer has indorsed his approval on the bond accompanying said application, both as to its form and sufficiency of the sureties.

The said treasurer in his return to said writ admits in the following words:

"That the said Martha E. Action did on the 28th day of September, 1896, present to and leave with me a statement or application for a liquor tax certificate under the Liquor Tax Law in the form prescribed by law and did then and there tender me the sum of \$58.33 and demand that I prepare and issue to her a liquor tax certificate."

Subdivision 1 of section 24 of the Liquor Tax Law, under which the said treasurer refuses to grant said certificate, reads as follows:

"Traffic in liquor shall not be permitted in any building owned by the public, or upon any premises established as a penal institution, protectory, industrial school, asylum, State hospital, or poor-house, and if such premises be situated in a town and outside the limits of an incorporated village or city, not within one-half mile of the premises so occupied, provided there be such distance of one-half mile between such premises and the nearest boundary line of such village or city."

From the admissions of the county treasurer as made by him in his return, I find that the said Martha E. Action, on the 28th day of September, 1896, filed with said county treasurer of Seneca county, N. Y., her verified application complying with all the provisions of section 17 of said Liquor Tax Law, and which application was correct in form; I also find that said relator duly filed in the office of said county treasurer the bond required by section 18 of said law, and that said bond was duly approved by said treasurer, both as to its form and the sufficiency of its sureties. I further find that said applicant tendered full pay for such certificate.

Section 19 of said Liquor Tax Law provides that when said sections 17 and 18 have been complied with the county treasurer *shall at once* prepare and issue to the person making such application and filing such bond and paying such tax, a liquor tax certificate in the form provided for in said act. This the said county treasurer refused to do because he had been advised not to do it, &c.

From the foregoing I hold that said treasurer had no discretionary power in the granting or refusal of such certificate; and I find from his return that said applicant complied with the provisions of said Liquor Tax Law and was entitled to a certificate, and the same was denied without good and valid reasons therefor; therefore, I do order the treasurer of the county of Seneca to grant such application and to issue a liquor tax certificate to such applicant upon the payment of the tax therefor.

Supreme Court, Onondaga Special Term, October, 1896. Reported.
18 Misc. 292.

THE PEOPLE ex rel. THOMAS RYAN and Another v. HUBBARD
MANZER, County Treasurer of Onondaga County.

Liquor Tax Law—Transfer of certificate.

A county treasurer is not justified in refusing to allow a person who holds a liquor tax certificate to transfer it to another, upon the ground that a verbal complaint has been made against the holder of the certificate that he was carrying on the liquor business in a room which connected with his grocery, such an act being a violation of section 22 of the Liquor Tax Law.

CERTIORARI to review the determination of the treasurer of Onondaga county in refusing to transfer a liquor tax certificate. The opinion states the facts.

George W. O'Brien, for relators.

Mead & Stranahan, for respondent.

SPRING, J. On July 1st last, a liquor tax certificate was issued to Patrick O'Day, in pursuance of subdivision 1, section 11 of the Liquor Tax Law, permitting him to traffic in liquors at 1032 West Fayette street, in the city of Syracuse.

On the 7th day of October, the said O'Day and the other relator, Ryan, formally applied to the county treasurer of said county to have said tax certificate transferred to said Ryan, and accompanied said application with the bond required by law, and offered to pay the \$10 allowed as the fees therefor and requested the treasurer to give his assent to such transfer in writing on the face of such certificate as the statute provides.

The treasurer declined to give such consent, alleging as his reason for such refusal that the applicant O'Day had "disqualified himself of the right to sell, assign or transfer said liquor tax certificate because of a violation of the provisions of the Liquor Tax Law." The precise excuse of the treasurer was that a complaint had been made against the said relator O'Day that he was carrying on the liquor business in a room or place connected and communicating with a grocery conducted by him, and which is in violation of section 22 of the Liquor Tax Law. No arrest or indictment of O'Day has ever been made or found and the accusation alone is the basis for the action of the treasurer in refusing to consent to the desired transfer.

Section 27 of the Liquor Tax Law (chapter 112 of the Laws of 1896) permits the transfer of these certificates. They are of property value and can be surrendered or assigned. In the section providing for the transfer the manner of so doing is set forth and there is no restriction imposed whatever.

That the treasurer, however, has a right to withhold his consent to the transfer is apparent from the succeeding section, for that provides the method of reviewing the action of the treasurer in case he declines to issue the certificate originally or to assent to the transfer. There is no provision, however, determining what

is an adequate reason or justification for the treasurer to decline to consent to the transfer.

Sections 22 to 24 inclusive of the act recite the inhibitions of the law, providing among other things that the traffic in liquors shall not be carried on in a place communicating with a place where the business of selling groceries is conducted. In case of a violation of these provisions either by material misrepresentations made in the application or by conduct subsequent thereto, any citizen of the State may by a proceeding in court test the right of the holder of the certificate to retain the same, and of course the holder has an opportunity to be heard and a trial is had upon the specific charges made, and if they are sustained the certificate is revoked and canceled by order of the court. By section 34, violations of the act are made misdemeanors and the fines and penalties imposed are specifically enumerated. In all the violations of the act and in the *certiorari* proceedings to test the right of the holder of the certificate to continue the business, a conviction or adverse adjudication is an essential prerequisite to the taking of any action prejudicial to the person accused or that may divest him of his property rights in the certificate.

Section 25 of the act provides for the surrender and cancellation, of the certificate. In that case the holder who has voluntarily ceased to traffic in liquors "before arrest or indictment for a violation of this act" may surrender such tax certificate for cancellation, and the officer issuing the same shall refund the *pro rata* amount of the tax paid for the unexpired term. However serious charges may have been made against the person desiring to surrender the certificate, however wilfully false may have been the essential statements in his application, they cannot be used to prevent the surrender of the certificate. If he has escaped the criminal process the treasurer must give him the full benefit accorded to an innocent man. The permission is dependent solely upon the voluntary cessation of the liquor traffic "before arrest or indictment," and in all other cases the actual determination of a court must precede any action detrimental to the right of the holder in his certificate.

In the case under consideration the reason assigned for declining to consent comes far short of an arrest or indictment. It is a mere unsupported accusation and, so far as the record shows, not even in writing. An arrest or indictment implies

the interposition of a court. There is some gravity, some foundation for the charge then, and the process of the court has been set in motion so the accused can soon meet the specific accusation.

The presumption is the accused is innocent; yet if the treasurer can refuse his consent whenever the holder of a certificate is verbally charged with violating any of the provisions of the law, the effect is to determine him guilty. Property rights should not be made dependent on so uncertain a basis. The rule contended for by respondent is too drastic and yet too intangible. Vindication of the law or its full enforcement does not require a construction that gives such arbitrary power to any one. To make effective the transfer the intended transferee makes a verified application like that of the original holder. He accompanies this with a bond identical with that given by his predecessor in title. If he makes any material misrepresentation or violates any of the provisions of the law he is amenable to punishment. Nor does the assent to the transfer exonerate the original holder either from punishment for material misstatements or violations occurring during his carrying on of the traffic. The transaction is not of sufficient significance to call for a strained construction of the law to obstruct or make difficult these transfers.

I take it these questions are to be determined as those of law based upon the record, the papers before the treasurer at the time he refused to consent to the transfer. By that standard the single point in controversy is, does the making of a charge of a complaint to the treasurer against the holder of a certificate justify that official in declining to consent to the transfer asked for? I am clear it is not a sufficient reason for his refusal. Any person from sinister purpose or otherwise could impede and prevent these transfers if that is the interpretation to be given to this statute.

An order will be granted requiring the respondent to consent to the transfer with \$50 costs to the relators, to be paid by the respondent out of the undivided assets received by him in pursuance of the act in controversy.

Ordered accordingly.

First Appellate Department, October, 1896. Reported. 9 App. Div. 436.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* HENRY W. KOENIG, Appellant.

Selling beer to minors—Trial in Special Sessions—Penal Code, § 290, not repealed by chapter 112 of 1896.

The provisions of the Liquor Tax Law (Chap. 112 of 1896), making the sale of liquor to a minor under sixteen years of age a misdemeanor, and providing that the offense "shall be prosecuted by indictment * * * and by trial in a court of record having jurisdiction for the trial of crimes of the grade of a felony," are not exclusive and do not repeal by implication that provision of the Penal Code which makes it a misdemeanor to sell liquors to a child actually or apparently under the age of sixteen years—an offense cognizable in the Court of Special Sessions of the city and county of New York, except in a case where the accused demands a trial by jury or where the case is subsequently removed into the Court of General Sessions.

Repeals by implication are not favored in the law, and a statute is not to be deemed repealed by implication by a subsequent statute upon the same subject, unless the two are manifestly inconsistent with and repugnant to each other, or unless a clear intention is disclosed on the face of the later statute to repeal the former one.

APPEAL by the defendant, Henry W. Koenig, from a judgment of the Court of Special Sessions of the city and county of New York, rendered on the 18th day of June, 1896, convicting the defendant of a misdemeanor.

W. M. Mullen, for the appellant.

John D. Lindsay, for the respondent.

VAN BRUNT, P. J.:

On the 5th day of June, 1896, the appellant was arrested within the city of New York and brought before a city magistrate, charged with violating section 290 of the Penal Code, in that he, the defendant, had sold beer to a minor under the age of sixteen years. When the defendant was arraigned for trial in the Court of Special Sessions he moved for a dismissal of the complaint on the ground that, under chapter 112 of the Laws of 1896, known as the Liquor Tax Law, the court had no jurisdiction to try the case for the following reason: That the only way in which the defendant could be prosecuted was by way of indictment and trial in a court of record having jurisdiction

for the trial of crimes of the grade of a felony. This motion was denied. At the close of the People's case the defendant renewed his motion, which was again denied; to both of which rulings the defendant duly excepted.

The provision of the Penal Code which the appellant was alleged to have violated was subdivision 3 of section 290, which provides that a person who sells or gives away, or causes or permits or procures to be sold or given away to any child actually or apparently under the age of sixteen years, any beer, ale, wine or any strong or spirituous liquors, is guilty of a misdemeanor. This provision was enacted in 1889 (chap. 170), and was concededly in force up to the time of the going into effect of the Liquor Tax Law above mentioned; and there is no claim made but that until the passage of this latter law, offenses against the provision quoted were cognizable in the Court of Special Sessions of the city and county of New York unless the defendant demanded a trial by jury, or thereafter the case was removed into the Court of General Sessions.

On the 23d of March, 1896, chapter 112 of the Laws of 1896, known as the Liquor Tax Law, was enacted; and by section 30 thereof it was provided, among other things, that "no corporation, association, copartnership or person, whether taxed under this act or not, shall sell or give away any liquors to (1) any minor under the age of eighteen years."

Section 34 declares, among other things, that any person who shall violate the provisions of this act by trafficking in liquor contrary to its provisions shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by fine, etc.

Section 35 provides that, "except as otherwise provided by this act, all proceedings instituted for the punishment of any violation of the provisions of the act, the penalties for which are prescribed in section 34, shall be prosecuted by indictment * * * and by trial in a court of record having jurisdiction for the trial of crimes of the grade of a felony."

It is urged upon the part of the appellant that section 290 of the Penal Code is impliedly repealed by chapter 112 of the Laws of 1896, and there undoubtedly would be considerable force in the contention had not the Liquor Tax Law itself provided as to what laws were repealed by it. By section 44, it repeals the provisions of "any special or local law, grant or charter in conflict with this act." The provision of the Penal Code in question was not a

special or local law, and, therefore, was not repealed by this section of the act.

Annexed to the act is a schedule of general laws, and the act provides that of the laws enumerated in this schedule that portion specified in the last column is repealed. But section 290 of the Penal Code is not there mentioned. This clearly indicates that it was not the intention of the Legislature to repeal any general laws except those enumerated in the last column of this schedule. This view is further strengthened by section 728 of the Penal Code, which provides that "no provision of this code, or any part thereof, shall be deemed repealed, altered or amended by the passage of any subsequent statute inconsistent therewith, unless such statute shall explicitly refer thereto and directly repeal, alter or amend this code accordingly."

The rule is well settled that repeals by implication are not favored, and that a statute is not to be deemed repealed by implication by a subsequent statute upon the same subject, unless the two are manifestly inconsistent with and repugnant to each other, or unless a clear intention is disclosed on the face of the later statute to repeal the former one. (*Heckmann v. Pinkney*, 81 N. Y. 215; *People v. Jaehne*, 103 id. 182; *McKenna v. Edmundstone*, 91 id. 231.)

Applying these rules to the case at bar, it is evident that there was no repeal by implication of the provisions of the Penal Code. It is true that the appellant might have been proceeded against under the provisions of the Liquor Tax Law. But those provisions were not exclusive; the two acts could stand together, and it was the evident intention of the Legislature not to repeal any general laws except those referred to in the last column of the schedule above mentioned. It might be further suggested that the acts in question have not the same object. The provisions of the Penal Code upon this subject have in view the protection of children, while those of the Liquor Tax Law relate entirely to the regulation of the liquor traffic.

It seems to be apparent, therefore, that the statutes are not at all *in pari materia*, and for this reason there could be no repeal by implication.

We are of opinion that the conviction should be affirmed.

BARRETT, RUMSEY, WILLIAMS and PATTERSON, JJ., concurred.

Conviction affirmed.

Supreme Court, Niagara Special Term, November, 1896. Reported.
18 Misc. 498.

Matter of the Application of CATHARINE JOHNSON for the Revoking of a Certain Liquor Tax Certificate heretofore Issued to LOUIS F. MAYLE.

1. **Excise—Surrender of certificate.**

Where the question of the validity of a certificate is brought into court, the county treasurer has no authority to accept its surrender and refund the pro rata amount of tax for the unexpired period.

2. **Same—Consents of neighboring owners—Revocation of certificate.**

Where an applicant for a liquor tax certificate omits, by mistake, to obtain the consents of the necessary number of owners of adjoining property, pursuant to subdivision 8 of section 17, chapter 112, Laws of 1896, at the time of the filing of his application for a certificate, yet, where he subsequently obtains and files consents sufficient to make the necessary number, the court may decline to revoke the certificate.

3. **Same—Costs of proceeding.**

Where the filing of the consents is not completed until after the application is made to revoke the certificate for want of necessary number of such consents, the costs of the proceeding are chargeable to the licensee.

APPLICATION for an order revoking and canceling a liquor tax certificate.

Aaron Fybush, for petitioner.

Franklin J. Mackenna and W. Caryl Ely, for licensee Louis F. Mayle and Canavan & Clary, transferees.

LAUGHLIN, J. It appears by the evidence taken before the referee appointed by the court in this proceeding that, on July 1, 1896, Louis F. Mayle presented to the county treasurer of Niagara county an application in the form and manner required by section 17 of the Excise Law, for a liquor tax certificate, to carry on business at the premises known as the State Park Hotel, in the city of Niagara Falls. He filed simultaneously with this statement certain consents of owners of occupied property, under subdivision 8 of that section. The liquor tax certificate was thereupon issued to him. It is evident that he acted in good

faith and believed that he had obtained the necessary consents of two-thirds of the owners of occupied property within two hundred feet of the premises in question, but, as a matter of fact, he had procured only one-half of such consents. After the petitioner applied to the court for an order canceling the certificate, and served notice upon Mayle, the latter obtained and filed with the county treasurer the consent of another property owner, which would make the necessary two-thirds consents, provided the consent thus obtained after the certificate was issued and after proceedings had been commenced in court can be counted for the benefit of the holder of the certificate. It appears that those who gave their consents originally still favor the application and have in no manner attempted to withdraw or revoke their consents. If the liquor tax certificate be now cancelled, Mayle will, by the express terms of section 28 of the Liquor Law, be obliged to forfeit the moneys heretofore paid for his license to carry on the business until next July, notwithstanding the fact that with the necessary consents he can at once obtain a new liquor tax certificate. He would not be aided, as contended by his counsel upon the argument, by the provisions of section 25, authorizing the holder of such a certificate to surrender the same up and obtain a rebate on account of the unexpired term of the certificate. The validity of this liquor tax certificate being now before the court, the county treasurer has no authority to accept its surrender and refund the *pro rata* amount of the tax paid for the unexpired period. Under these circumstances, equity forbids the cancellation of the liquor tax certificate unless the law leaves no alternative. The statute authorizing the application provides that at any time after a liquor tax certificate has been issued a petition may be presented to a justice or Special Term of the Supreme Court "for an order revoking and canceling such certificate, upon the ground that material statements in the application of the holder of such certificate were false, or that he is not entitled to hold such certificate."

The statute provides with respect to the power and duty of the court on such an application, and after the evidence has been taken before the court or a referee, as follows:

"If the justice or court is satisfied that material statements in the application of the holder of such certificate were false or that the holder of such certificate is not entitled to hold such cer-

tificate, an order shall be granted revoking and canceling such certificate. The decision of such justice or court shall be final and conclusive and no appeal therefrom shall be had or taken.

* * * Costs upon such proceedings may be awarded in favor of and against any party thereto, in sums as in the discretion of the justice or court before which the petition is heard may seem proper."

The evidence fails to show that any material fact stated in the application was untrue. The law does not require the applicant to state in his application that he has obtained the necessary consents of property owners; but merely requires that such consents shall be filed simultaneously with the statement or application. It has been seen that the only other ground on which the certificate can be canceled is "that the holder of such certificate is not entitled to hold" the same. It is evident that the legislature intended that the certificate should be canceled if any material statements in the application were false. If all such material statements were true, however, and the applicant, through mistake or excusable neglect, has failed to comply with the provision requiring the filing simultaneously with his application of the consents of property owners, but has subsequently obtained and filed such consents, the court is authorized to exercise its equitable discretion, and decline to cancel the liquor tax certificate.

At the time the petitioner applied to the court the licensee had no right to hold the certificate, and the court subsequently saw fit to order a reference to determine whether the respondent had a right to hold the certificate at the time it was issued, or afterward perfected such right.

The expense of this reference has been borne by the petitioner, and it was rendered necessary through the neglect of the licensee; equity, therefore, requires that he should pay the costs. The petitioner is awarded the sum of \$125 for her costs and disbursements herein, against the respondent Louis F. Mayle, and an order may be entered accordingly, and dismissing the petition.

Ordered accordingly.

Supreme Court, New York Special Term. Reported N. Y. L. J.,
November 30, 1896.

THE PEOPLE ex rel. WILLIAM S. GRAY v. GEORGE HILLIARD as
Special Deputy Commissioner of Excise.

BEEKMAN, J. The relator is the duly appointed receiver of a judgment debtor who is the holder of a liquor tax certificate having still some time to run. The receiver is not in possession of the certificate, and as the judgment debtor cannot be found he is not able to obtain such possession. Proof of these facts has been submitted to the commissioner of excise, coupled by a formal statement by the receiver that he surrendered the certificate and demanded the surrender value, under section 25 of chapter 112 of the Laws of 1896, known as Liquor Tax Law. The commissioner has refused to recognize the validity of this demand, on the ground that, under the law, the party making the demand must physically surrender the certificate in order to entitle him to receive the rebate. The question is brought up for consideration upon a demurrer to the return made by the commissioner to a writ of alternative mandamus which has been sued out by the relator to compel such payment. A liquor tax certificate under the liquor law has a double significance. It not only evidences the fact of the payment of the tax, but it also operates to make a traffic in liquors lawful for the person to whom it is issued. Furthermore, the physical possession of the certificate is also essential to authorize such traffic and its continuance during the term for which the tax has been paid. Section 21 of the law provides that before commencing or doing any business for the time for which a liquor tax is paid and a certificate is given, such certificate shall be posted up and at all times displayed in a conspicuous place where such traffic is carried on. Section 27 permits the sale and assignment of such certificate and authorizes the purchaser to continue the traffic thereunder on certain conditions — among others, the presentation of such certificate to the officer who issued the same, or to his successor in office, "who shall write or stamp across the face of the certificate, over his signature, the words 'consent is hereby given for the transfer of this liquor tax certificate to' (and here insert the name of the corporation, association, copartnership or person to

whom the same is transferred).” Section 25 provides that the holder of such certificate may surrender it to the officer who issued the same, “who shall thereupon cancel the same and refund the pro rata amount of the tax paid for the unexpired term of such tax certificate.” The same section also provides that a receiver of the property of a person holding such certificate may in like manner, surrender the same, or may continue to carry on the business, in which latter event the certificate shall have written or stamped across its face, over the signature of the officer who issued the same, a permission to continue the traffic for the unexpired term. Sufficient has been shown to indicate the importance attached to the physical possession of the certificate, and the dependence of the rights of the person to whom it has been issued, or to whom it has been transferred, upon such possession. I have, therefore, come to the conclusion that when the statute provides for the surrender and cancellation of the certificate, it means not only a surrender of the rights to traffic in liquor under the law, but also, where it is in existence an actual surrender of the paper itself and its physical cancellation. The importance of this to a proper administration of the law by those appointed to supervise its operation is apparent. Taking the present case as an illustration, it may be that before the receiver was appointed the judgment debtor has assigned the certificate, and transferred its possession to such assignee. Should such purchaser present it to the commissioner, with the written application and bond required by the law, the latter would be compelled to give his consent to such transfer and thereupon the assignee would be entitled to traffic under the certificate in like manner as if it had been originally issued to him. In that event, if the refund asked for in his application should have been made, the situation would be either one where the commissioner would become personally responsible for the amount of the tax so refunded, or the business would be carried on under the certificate for the balance of the term without the payment of the tax, which conditions the lawfulness of the traffic. The statute should not receive a construction which would result in such inconsistency and confusion. I am, therefore, of the opinion that upon the facts before me the relief asked for should not be granted. In stating this conclusion, I also wish it to be understood that I do not decide that appropriate relief may not be obtained where the certificate has been destroyed through some

casualty, and that fact plainly appears. That would present a different case, to be determined upon a different principle. All that I undertake to hold here is that where it appears that the certificate is in existence, the commissioner of excise cannot be called upon to accept a surrender of the same without its physical production for cancellation. For the reasons which I have stated, it follows that the demurrer must be overruled and judgment awarded to the respondent, dismissing the writ.

County Court, Broome County, December, 1896. Unreported.

PEOPLE v. SAMUEL J. WEIR.

APPEAL from a judgment of the Recorder's Court of the City of Binghamton convicting the defendant of having violated section 1 of article 1 of title 7 of the Ordinances of the City of Binghamton in keeping his saloon open for the transaction of business, between the hours of twelve o'clock midnight and one o'clock in the morning.

Charles F. O'Brien and R. B. Richards, for appellant.

James T. Rogers, for respondent.

ARMS, Co. J.: Section 1 of article 1 of title 7 of the Ordinances of the City of Binghamton provides that "every saloon, restaurant, bar or other place, where any distilled or fermented liquor is kept for sale (except drug stores) and every billiard room, bowling alley, or place where games of chance or skill are carried on or permitted, as a business, or in connection with any business, shall be closed on Sundays and every night on or before twelve o'clock and shall remain closed until five o'clock the following morning.

"Any person owning or having charge of any place above mentioned, who shall violate any provisions of this section shall be subject to a fine not to exceed \$100."

This ordinance was in force when chapter 112 of the Laws of 1896, known as the Liquor Tax Law, took effect.

There is no dispute over the facts, and the only question pre

sented here is whether the ordinance above quoted is still in force notwithstanding the passage of chapter 112 of the Laws of 1896. By section 44 of that act it is provided that "the provisions of any special or local law, grant or charter in conflict with this act are hereby repealed and annulled" and it is contended by the appellant that this provision repealed the provisions of the local ordinance, while on the other hand it is contended by the respondent that the legislature and the ordinance in question do not conflict; that the ordinance does not assume to regulate the traffic in liquors but is a part of the police power conferred upon the local authority to regulate the times, and the places, where such traffic shall be conducted.

It was said in *People v. Murray*, 4 App. Div. 193, that the result of the new liquor law was "the total extinction of an entire excise system and the creation of another and different one, including the whole State and embracing in a single scheme everything necessary to the establishment and operation of a complete system, even to the very details required by different conditions in different localities." This case was affirmed in the Court of Appeals, it being the case in which the constitutionality of the law was assailed.

It is a well-settled rule that a later statute covering the same subject-matter and embracing new provisions operates to repeal the prior act, although the two acts are not in express terms repugnant.

Another well-settled rule is, that where a later statute not purporting to amend a former one upon the same subject, covers the whole subject and was plainly intended to furnish the whole law thereon, the former statute will be held to be repealed by necessary implication.

Chapter 112 of the Laws of 1896, is named "Liquor Tax Law," but it was said in *People ex rel. Einsfeld v. Murray*, 149 N. Y. 39: "It is radically different in some respects from the excise laws which it superseded. But the changes are in the administration of the excise system and not in its essential character. The most notable changes are (1) State supervision in place of supervision through Boards of Excise, and (2) the opening of traffic to all citizens (with certain exceptions) who shall pay the license tax and give the bond required."

A careful examination of the Liquor Tax Laws leads one almost irresistibly to the conclusion that it was intended as a

general and uniform law, and as the only law, to govern and control the business of trafficking in liquors on the points to which its provisions relate and for which they provide. To hold otherwise might lead to serious complications and difficulties.

Under its provisions a person holding a tax certificate has the unquestionable right to sell up to one o'clock in the morning. Until that time, he is not required to expose to view from the street the inside of his place of business. Now if the ordinance in question is still in force, while he would be obliged to close and lock his outside door at twelve o'clock, he might have any number of people inside between the hours of twelve and one to whom he could sell whatever they wanted for the period of one hour, during which time their acts and conduct would not be subject to the observation of or interference by any officers of the law, as neither a special agent or a police officer would have any authority to break in and enter the place. It seems quite apparent that the two provisions are both inconsistent and repugnant. The license tax imposed by this act is uniform and equal in its several grades in all the counties of the State and, if it were to be subject to either abridgment or partial nullification by local authorities it would no longer be a uniform scheme under the direction of the State, but might be made subordinate to the varied and different ideas of the different towns, villages and cities throughout the State. Such legislation would be absurd in theory and might easily lead to inequality and injustice. Moreover, I am of the opinion that the ordinance in question was expressly repealed by section 44 of the Liquor Tax Law.

From these views, it follows that the judgment of conviction should be reversed and the defendant discharged.

Supreme Court, Washington Special Term, December, 1896. Unreported.

In the Matter of the Application of JOSEPH C. RUSSELL to revoke the Liquor Tax Certificate of MICHAEL NOONAN.

STOVER, J. This is an application under section 28 of the Liquor Tax Law, for the revocation of a certificate. The only issue raised by the proof is as to the allegation that the consent

of two-thirds of the owners of buildings, occupied exclusively as dwellings, was not obtained by the defendant at the time of making his application. It appears that there were two buildings within 200 feet of the property; Mrs. Frasier's, whose consent was obtained, and the petitioner's. The petitioner is a practicing physician, and has an office in the building occupied by him as a residence. He receives his patients there and is engaged in the general practice of medicine.

The simple question is whether this is a building occupied exclusively as a residence. While it may be said that the object of the restriction was to maintain the privacy of the home, and to prevent rendering residential localities objectionable, by the placing of saloons near them, yet it was within the power of the Legislature to limit the operation of the rule, and it has seen fit to do so, by providing that the building should be exclusively used for residential purposes. The office contains the medical books, some medicines, bottles, and the usual paraphernalia of a physician's office. The petitioner has a sign upon the building and testifies that he is in active practice.

No test has been laid down as to what shall be considered a residence within the meaning of the statute under consideration, but I am inclined to think upon the principle, that where a portion of a building is used for the purposes of a general business, or the general practice of a profession, to which the public is invited, it can not be said to be used exclusively for residential purposes. As for the purpose of this case, the using of a portion of a building as an office, for the general practice of a profession, would be quite as much an interference with the use of the building for residential purposes, as a setting apart of the same space for the carrying on of any mercantile or other business. The public is invited to the room, not for the purpose of mere social intercourse, but for the purpose of availing itself of the professional advice and treatment of the petitioner; and I take it that to this extent the portion of a building occupied by an office is subordinated to its use for residential purposes. While it may be said that the evil to the family of the petitioner is just as great as though the building were occupied exclusively as a residence, yet with this the court can have nothing to do. The Legislature has seen fit to impose the restriction and to confine the operation of the statute to the buildings that are used exclusively for residential purposes. The remedy, if any, lies with the legis-

lative power, and the court has no discretion to exercise in the premises.

I think the petitioner has failed to sustain the allegations of his petition and the application to revoke or cancel must be denied.

City Court of New York, General Term, December, 1896. Reported.
18 Misc. 604.

Matter of HERMAN, et al., Judgment Creditors v. BORRIS M.
GOODSON, Judgment Debtor.

W. HARRY COHEN, as Receiver, Appellant; THE S. LIEBMAN SONS
BREWING Co., Respondent.

Excise—Assignment of certificate.

An assignment of a liquor tax certificate can not be treated as a nullity or attacked collaterally by a receiver of the licensee; if he desires to question its legality he must do so by action to set it aside.

APPEAL from an order requiring the receiver to surrender a liquor tax certificate to the brewing company.

W. O. Campbell, for appellant.

Samuel Hoff, for respondent.

FITZSIMONS, J. The defendant and judgment debtor herein, desiring, prior to the judgment herein, to carry on a saloon business in this city, applied to and received from the proper authority a license to carry on such business.

The license fee of \$800 was loaned him by the S. Liebman Sons Brewing Company, and it received from him an assignment of such license; the deputy excise commissioner, upon receipt of said \$800 and it having been established to his satisfaction that Goodson was a proper person to receive such license, issued it to him; a receipt for said license fee, which empowered said Goodson to carry on said saloon business until a license was issued to him, and the assignment herein referred to was made prior to the issuance of the said license.

The judgment herein was obtained against the said Goodson, the receiver herein was appointed and he received from the

judgment debtor the liquor tax certificate and he then applied to the excise commissioner for the rebate moneys due to the judgment debtor on the unexpired coupons on said certificate just as if the judgment debtor had presented same for surrender and cancellation, as allowed him by the Excise Law of 1896.

Because of such action of the receiver, an order to show cause was granted herein, and an order thereon was made requiring the said receiver to surrender to the brewing company the said certificate because of the assignment of the same to the said company. From said order this appeal is taken.

The order appealed from, in our judgment, was a proper one.

Chapter 112 of the Laws of 1896 permits an assignment of the liquor tax certificate in question to be made.

If the receiver desires to question the legality of such transfer, he should do so by the usual action to set the same aside and not attack it collaterally or regard it as a nullity, as he has endeavored to do in this instance.

Such assignment must stand until it is duly set aside by a competent tribunal and by lawful means, not arbitrarily and by mere physical force.

The order appealed from must be affirmed, with costs.

O'Dwyer, J., concurs.

Order affirmed, with costs.

Supreme Court, Albany Special Term, December, 1896. Reported.
18 Misc. 653.

**Matter of the Petition of FREDERICK ZINZOW to Revoke a Liquor
Tax Certificate Issued to PETER SCHMIDT.**

1. Excise—Location of building.

A building which is situated on the corner of two streets is a building on one of the streets as well as on the other, and the prohibition against the carrying on of the liquor traffic therein within 200 feet of a church or schoolhouse applies, notwithstanding that the entrance is on another street.

2. Same—Effect of abandonment of a saloon.

The owner of such a building who was carrying on a saloon therein at the time of the passage of the Excise Law of 1892, quit the business thereafter and leased the premises to a tenant who obtained a license and

carried on a saloon business there until May 1, 1896. *Held*, that by the abandonment of the business by the owner the exemption from the restrictions in the Law of 1892 were lost, and that the licenses to the tenant were, therefore, improperly granted and the traffic in liquors was not lawfully carried on there at the time when the Liquor Tax Law took effect.

3. Same—Church.

A building is not the less exclusively used as a church because one of its rooms is used for a parochial school and also by societies connected with the church or by religious and charitable societies which the church authorities permit to hold meetings therein.

APPLICATION to revoke a liquor tax certificate.

James H. Coyle (J. F. Montignani, of counsel), for petitioner.

John Gutmann, for defendant.

Nussbaum & Coughlin, for county treasurer.

CHESTER, J. The petitioner, who is a citizen of the State and a trustee of the church hereinafter mentioned, seeks to procure the revocation of a liquor tax certificate issued to the defendant Peter Schmidt by the county treasurer of Albany county to traffic in liquors at 56 Elizabeth street, in the city of Albany, upon the ground that material statements in the application for such certificate are false and that the defendant is not entitled to hold the certificate.

The applicant stated in his application that the location of the premises where he proposed to carry on business was at 56 Elizabeth street, Albany; that the traffic in liquors was actually lawfully carried on in said premises at the time of the passage of the Liquor Tax Act; that he could lawfully carry on such traffic on such premises under subdivision 1 of section 11 of said act, and that he was not within any of the prohibitions of the act. The petitioner insists that all these statements are false.

The controversy arises principally over three questions: First. Whether the premises were 56 Elizabeth street or 64 Alexander street. Second. Whether or not the traffic in liquor was lawfully carried on in the premises in question at the time of the passage of the Liquor Tax Act; and, Third. Whether or not the Deutsche Lutherische St. Trinitatis Kirche, known as the German

Trinity Church, on Alexander street, is a building occupied exclusively as a church or a schoolhouse.

First. The saloon occupied by the defendant is situated on the southeast corner of Alexander and Elizabeth streets, and the entrance thereto, whether on Alexander street, as formerly, or on Elizabeth street, as now, is within two hundred feet of all entrances to the church in question. Alexander street runs east and west, and Elizabeth street north and south. The church is on the south side of Alexander street, on the same side of the street as the Schmidt premises, and about seventy-eight feet to the east thereof.

The entrance to the saloon, prior to the taking effect of the Liquor Tax Act, which was on the 23d day of March, 1896, had been on Alexander street and the street number was 64 Alexander street. There had, however, been an entrance on Elizabeth street to the basement, the floor below the part of the building used as a saloon, which had been known for some years as 56 Elizabeth street, and which entrance was some thirty or forty feet from Alexander street. There had been no entrance directly to the room used as a saloon from Elizabeth street up to that time.

On the next day, March 24th, a new doorway was cut from Elizabeth street into the saloon about three or four feet from the corner of Alexander street and the door leading directly to the saloon on the latter street was nailed up. The new entrance was numbered 56 Elizabeth street. There still remained, after these changes were made, an entrance by way of a hall-door on Alexander street through a hallway and an interior hall-door to the saloon.

I do not regard these changes in the entrance or the question as to whether the building was 56 Elizabeth street or 64 Alexander street as controlling upon the question as to whether or not it was within the prohibited distance from the church in question. In either event the saloon was in the same room, and the building, being on the corner, was a building on Alexander street as well as on Elizabeth street. The statute provides that the traffic in liquor shall not be permitted in any building which shall be on the same street and within two hundred feet of a building occupied exclusively as a church or a schoolhouse. Liquor Tax Act, chap. 112, Laws 1896, § 24. The building in question is on the same street and within the prohibited distance and the prohibition applies notwithstanding the entrance is on

another street. *People ex rel. Clausen v. Murray*, 5 App. Div. 441; *Commonwealth v. Whelan*, 134 Mass. 306.

The question as to whether the saloon was at 64 Alexander street, or at 56 Elizabeth street, is material, however, in determining whether some of the statements made in the application are true or false. All the licenses for this saloon prior to the time of the enactment of the Liquor Tax Act had been for 64 Alexander street, but it appears that on the day of the passage of that law the board of excise of the city of Albany granted a license to Louis or Alois Rinn to sell strong and spirituous liquors, ales, etc., at No. 56 Elizabeth street, which was afterward transferred to 58 Elizabeth street. The defendant may have believed that because of this license he was truthfully stating what he did in his application with reference to the location of the premises where he desired to traffic in liquors and in stating that he could lawfully carry on the traffic there, yet if that license was not lawfully issued, or if the traffic was not lawfully carried on there at the time, while the former statement might have been true the latter would be false.

Second. Was the traffic in liquor lawfully carried on in the premises at the time of the taking effect of the Liquor Tax Act?

It appears that the building in question is owned by the defendant Peter Schmidt and that for about nine years prior to and including the 30th day of April, 1892, he kept a saloon there under licenses issued to him by the excise board of the city of Albany. He then quit the business and leased the premises to Louis Rinn, who took possession May 2, 1892, and carried on the saloon business there under license from such excise board until the 1st day of May, 1896. Before taking possession of these premises Rinn had been conducting a licensed saloon on Second avenue.

The Liquor Tax Law, in section 24, provides that traffic in liquor shall not be permitted under the provisions of subdivision 1 of section 11, "in any building which shall be on the same street or avenue and within two hundred feet of a building occupied exclusively as a church or schoolhouse; * * * provided, however, that this prohibition shall not apply * * * to a place in which such traffic in liquors is actually lawfully carried on when this act takes effect."

The act took effect March 23, 1896. The traffic in liquor was then carried on there by Louis Rinn, and had been since May,

1892, as above stated. During the time Rinn occupied the place Schmidt had no connection with the business.

To determine, then, whether Rinn was lawfully carrying on this traffic there at the time the Liquor Tax Law of 1896 took effect, it is necessary to refer to the law in force during the time Rinn occupied this place and prior to the taking effect of the present law.

The Excise Law (Chap. 401, Laws of 1892), which was passed April 30th of that year, and took effect immediately, provided, in section 43, that "no person or persons who shall **not** have been licensed prior to the passage of this act, shall hereafter **be** licensed to sell strong or spirituous liquors, wine, ale and beer, **in** any building not used for hotel purposes, and for which a license **does** not exist at the time of the passage of this act, which shall be **on** the same street or avenue and within two hundred feet of a building occupied exclusively as a church or a schoolhouse." The section was amended in 1893 by chapter 480, section 11, but the above-quoted clause was not changed by the amendment.

The restrictions in the act of 1896, above quoted, clearly apply to the building in which the traffic is to be carried on, but the language of the restriction in the act of 1892, above quoted, has been construed to apply not only to the person seeking a license but to the place for which he seeks it. *People ex rel. Cairns v. Murray*, 148 N. Y. 171.

The case cited also holds that when the licensee, established at a place when the act of 1892 took effect, abandoned the business, the prohibition of the statute became absolute as to all new applicants.

With this construction of the Excise Law of 1892 as our guide, it is clear that the licenses to Rinn for 64 Alexander street and the later one for 56 Elizabeth street, which, in either case, was the building in question, were improperly granted, and that, therefore, the traffic in liquors was not lawfully carried on there at the time the Liquor Tax Act of 1896 took effect, and also that when Schmidt, the defendant, quit the liquor business and left that place in May, 1892, he lost whatever rights he might have had in that respect under that law if he had remained. See also *Matter of Ritchie*, 18 Misc. Rep. 341; *People ex rel. Sweeney v. Lammerts*, id. 343.

Third. But it is urged that the church in question was not occupied exclusively as a church, and, therefore, that the

prohibition of the act does not apply. The organization owning the church building is a regular incorporated religious society, which has worshipped in this building for twenty years, being accustomed to hold two preaching services and two Sabbath-schools there every Sunday. The first or principal floor of the building, having its entrance on Alexander street, is used for the ordinary and usual religious services by the congregation worshipping there, and for weddings, baptisms and funerals. There seems to be no question that this, the principal floor of the church building, has always been and is now occupied exclusively as a church. Under this floor there is a basement, the front part of which is used for storage of fuel for the heaters and for church closets. The back or the south end of the basement contains a room fitted up as a schoolroom with desks, wardrobes, benches, chairs and tables. This room is used for the meetings of the trustees of the church and has been used for festivals, fairs, concerts and other church entertainments which have from time to time been held there for the purpose of raising funds for the church. All these uses are so clearly and so closely connected with the usual functions of a modern church organization as not to impair in any way the exclusive occupancy of the building as a church. The room in question is also occupied upon certain week days as a parochial school, under the direct care and control of the church and attended mainly by the children of the church members, but, as the act prohibits the liquor traffic within 200 feet of a school as well as of a church, it is not important to consider that fact upon the question we are now discussing.

The contention of the defendant on this branch of the case comes principally, however, from the fact that various associations and societies have been allowed to meet from time to time in the room in question. With reference to the meetings of the Concordia Singing Society, the Women's Society and the Young People's Society of the church, it is sufficient to say, that the proof shows that they are so intimately and closely connected with the work and purposes of the church that they may fairly be considered parts of it.

A society, known as the First German Protestant Society, also meets in this room once a month. It pays the church \$25 a year—not as a rent, but to cover the expenses for light, fire and cleaning. Many of its members and most of its officers belong to the church or congregation in question. While some are mem-

bers of other churches, all are members of some church. The constitution and by-laws show that, while this is a benefit society to the extent of assessing its members for the purpose of raising moneys to pay death benefits and for the relief of sick members, yet that it is essentially a religious and charitable association, organized "to accomplish a more intimate coalition and alliance of the members of the Protestant faith in the city of Albany and vicinity," and "to give Protestants, through closer alliance, opportunity to foster, protect and defend their faith against all attacks." Its membership is limited to those of the Protestant faith, who are required to subscribe to certain religious principles, including "faith in the Trinity of God and in the Holy Bible," as a condition of membership. The directors are regarded as elders of the society. The organization has no contract right, unless it be an implied one to meet in this room, and is simply suffered or permitted by the church to occupy it upon the terms stated, and the privileges given them by the church are revocable by the church at pleasure.

Substantially, the same remarks are applicable to the Men and Young Men's Society, which also meets here. While the society is also a benefit society, yet its constitution shows that it is essentially a religious society, organized for the purposes of effecting a closer communication among the members of the church, of sustaining the church, promoting Christian culture and inducing outsiders to join the church, and its meetings are opened and closed with prayer, in accordance with a ritual used by it.

It appears to me, from a careful examination of the constitutions of the two last-named societies, which are the only ones meeting there which may not be properly considered under the proofs as directly connected with the church organization in question, that if either of them used the building in question for the purpose of its individual organization alone, it could still be fairly regarded as a church, within the meaning of that term, as used in this statute.

The statute in question is to be liberally construed to give full effect to the beneficent purpose for which it was enacted, which is the protection of the church and the school from the influences of the saloon. *People ex rel. Clausen v. Murray*, 5 App. Div. 441.

To say that because two or more religious societies occupy the same building for their meetings renders the building one not exclusively occupied as a church, and that, therefore, neither

would be entitled to the protection of the statute, would be an absurd perversion of justice. It would rather, it seems to me, be an added reason for applying the protection of the statute.

A church has been defined to be "a building consecrated to the honor of God and Religion." Anderson's Law Dictionary, title "Church", Robertson v. Bullions, 9 Barb. 95.

Bouvier defines a church to be "a society of persons who profess the Christian religion," and "the place where such persons regularly assemble for worship." Bouvier's Law Dictionary, title "Church."

I think the word "church," as used in the statute, is comprehensive enough in its meaning to include all the multifarious denominations or societies of those professing the Christian faith, no matter what their varying shades of belief or doctrine may be, and no matter with what ceremony or absence of ceremonies their faith may be evinced.

If I am right in this view, the word is broad enough to include each of the two societies in question and the building devoted to their meetings. But if I am wrong in this respect, I have no hesitation in holding that the occasional or even the regular meeting of these societies in this room, by permission of this church, does not in any way impair the exclusive occupancy of the building as a church, for the reason that they are essentially religious and charitable organizations closely allied in their principles and in their work to the purposes of the church at large, if not of this particular church.

It does not matter that these two societies have, as an incident of their religious and charitable work, the raising of moneys for the relief of sick members and of the widows and orphans of deceased members. Some may regard this feature as of a secular rather than of a religious character, but every religious society must, in the nature of things, have more or less to do with secular affairs in conducting the business necessarily incident to maintaining its organization and prosecuting its work. Because this incidental business happens to be transacted by the society in the church building does not render it one not exclusively occupied for its primary and chief purposes as a church.

I think this view is clearly in harmony with the authorities and that the building in question is, under the proofs in this case, occupied exclusively as a church and schoolhouse. People ex rel.

Cairns v. Murray, 148 N. Y. 171; *People ex rel. Clausen v. Murray*, 5 App. Div. 441.

It follows that the defendant is not entitled to hold the certificate issued to him and that the same should be revoked and canceled, with costs to the petitioner, to be taxed in such sums as may properly be allowed under section 3240 of the Code of Civil Procedure.

Ordered accordingly.

Second Appellate Department, December, 1896. Reported. 11 App. Div. 74.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MARTIN ANDERSON, Appellant, *v.* JOHN HOAG, Treasurer of the County of Westchester, Respondent.

Liquor Tax Law—Determination as to dwelling within 200 feet—A saloon.

Under the Liquor Tax Law (Chap. 112 of the Laws of 1896) it is for the county treasurer to determine from the application, or otherwise, the number of buildings occupied exclusively as dwellings, whose nearest entrance is within 200 feet of the nearest entrance to premises in which it is proposed to carry on the traffic in liquor.

The return to a writ of certiorari issued to review the determination of a county treasurer, refusing to issue a liquor tax certificate, stated that the applicant had not procured the consent of two-thirds of the owners of such buildings.

Held, that the return was conclusive upon the question, and that the county treasurer's determination should be affirmed.

APPEAL by the relator, Martin Anderson, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 30th day of September, 1896, affirming the decision of the county treasurer denying the application of the relator for a liquor tax certificate, and quashing a writ of certiorari issued in the proceeding.

Frederick W. Sherman, for the appellant.

Wilson Brown, Jr., for the respondent.

BROWN, P. J. The application of the relator for a liquor tax certificate having been refused by the county treasurer, he applied

to a justice of the Supreme Court for a writ of certiorari to review the action of such officer. The writ was granted, and the county treasurer having made his return thereto, upon the hearing had the relator's application for such certificate was denied and the writ quashed, and from the order entered upon such hearing the relator has appealed to this court.

From the return of the county treasurer it appears that written application for the certificate was made by the relator upon a blank furnished to him by the county treasurer. Upon such blank there were printed questions, numbered respectively from 1 to 11, the answers to which were written by the applicant, and this statement was subscribed by the applicant and sworn to on the 10th day of September, 1896. It contained all the information which section 17 of the Liquor Tax Law (Laws of 1896, chap. 112) requires that applicants for such certificates shall furnish. Among other matters, it stated that there were three buildings occupied exclusively for dwellings within 200 feet of the nearest entrance to the building where the liquor traffic was to be carried on, each building having a separate owner. There was also filed with the application a consent by Patrick T. Mongan, the owner of the building, to the carrying on of the traffic in liquors therein, and also a consent in writing signed by Mrs. M. Provoost and Joseph S. Provoost, owners of buildings occupied exclusively as dwellings and situated within 200 feet of the nearest entrance to the premises described in the statement, consenting that the traffic in liquors should be carried on in such premises.

The said county treasurer further returned that before such application had been received by him the said Joseph S. Provoost had filed with him a paper withdrawing his consent, and further, that upon investigation he ascertained that there were five buildings used exclusively as dwellings within the prohibited distance of the building where said traffic was to be carried on, and that the relator was left without the consent of two-thirds of the owners of houses used exclusively as dwellings within 200 feet of said property, and that for such reasons he denied said application and refused to issue the certificate.

We are of the opinion that the order appealed from must be affirmed. Section 19 of the Liquor Tax Law provides that "When the provisions of sections seventeen and eighteen of this act have been complied with and the application provided for in section seventeen is found to be correct in form and the bond required by

section eighteen is found to be correct as to its form and the sureties thereon are approved as sufficient by the county treasurer," then upon the payment of the taxes levied, etc., "the county treasurer of the county * * * shall at once prepare and issue to the * * * person making such application * * * a liquor tax certificate in the form provided for in this act."

Section 17 provides that every person applying for a certificate shall make upon a blank, to be furnished by the county treasurer, a statement setting forth: *First*, the name of the applicant; *second*, the name of every person interested or to become interested in the traffic in liquors; *third*, the premises where such business is to be carried on; *fourth*, under which of the first three subdivisions of section 11 of the act the traffic is to be carried on; and, *fifth*, a statement that the applicant may lawfully carry on such traffic. It further provides, in subdivision 8, that "when the nearest entrance to the premises described in said statement as those in which traffic in liquor is to be carried on is within two hundred feet of the nearest entrance to a building or buildings occupied exclusively for a dwelling, there shall also be so filed simultaneously with said statement a consent in writing," executed at least by two-thirds of the owners of the buildings, that such traffic in liquors may be carried on in the premises described in the statement.

It is the contention of the appellant that the county treasurer is bound by the statements in reference to the aforesaid facts made by the applicant, and that if such statement is correct in form, the county treasurer has no discretion except to issue the certificate. It will be observed, however, that section 17 does not require that any information in reference to the contiguity of dwellings to the place where the traffic is to be carried on shall be furnished by the applicant. All that that section provides is that the consent of two-thirds of the owners of dwellings within the prohibited distance shall be filed simultaneously with the statement.

So far as it is to be gathered from the statute the facts in reference to the contiguity of such dwellings is to be ascertained and determined by the county treasurer. He may obtain or require information on this subject from the applicant and may rely thereon, but he is not necessarily concluded thereby. In respect to such matters his determination is judicial. He must

ascertain and determine the number of dwellings within the prohibited distance, and there must be filed with him the consent of the necessary two-thirds of the owners of such buildings. His determination in that respect is subject to review by a judge of the Supreme Court upon a writ of certiorari, and is to be affirmed in case the reasons assigned for refusing to grant the certificate are good and valid. It appears in the case before us that the county treasurer refused to grant the certificate to the relator upon the ground that there were five buildings used exclusively as dwellings within 200 feet of the nearest entrance to the place where the relator proposed to carry on the traffic in liquors, and that two-thirds of the owners of such buildings had not given their consent to such traffic. Upon this question his return is conclusive.

Upon the facts stated the application was properly denied by the county treasurer, and the order appealed from must be affirmed, with ten dollars costs and disbursements.

All concurred, except, CULLEN, J., who concurred in the result.

Order affirmed, with ten dollars costs and disbursements.

Fourth Appellate Department, December, 1896. Reported. 12 App. Div. 625.

PEOPLE ex rel. WILLIAM HOLZ, Appellant v. DANIEL O'GRADY, as Special Deputy Commissioner of Excise of Erie County, Respondent.

APPEAL from an order dismissing writ of certiorari to review the refusal of the respondent to issue a liquor tax certificate because of false statement in application.

Frederic H. Pomeroy, for Appellant.

The special deputy commissioner has no discretionary or judicial authority by virtue of which he may grant or refuse a certificate at his option. (Liquor Tax Law, §§ 17, 18, 19; *People ex rel. Rochester Whist Club v. Hamilton*, 17 Misc. 12).

The applicant in his statement, swearing that there are no

buildings within two hundred feet used exclusively as dwellings, the commissioner is bound by such statement.

Henry W. Brendel, for Respondent.

The order is not appealable. (Liquor Tax Law §28; Code Civil Proc. § 1361). The return of the Special Deputy Commissioner as to the facts therein stated is conclusive. (*People ex rel. Sims v. Commrs.* 73 N. Y. 437; *People ex rel. Simonds v. Ryken*, 6 Hun, 625.)

Where the Commissioner of Excise has knowledge of any fact which, if stated in the application, would prevent the issuance of the certificate, he can deny the application.

Order affirmed with ten dollars costs and disbursements. All concurred.

Supreme Court, Kings Special Term, January, 1897. Unreported.

In the Matter of the Petition of HARRY W. MICHELL for an Injunction against JOHN FLYNN.

OSBORNE, J. S. C. I agree with the reasoning in "*Brown v. Hilton*, 40 Mass. R. 319" and "*Cobb v. Billings*, 23 Maine, 470" and am of the opinion that the sale by Flynn of the six gallons of liquor at one time, though of two different kinds, was not a "trafficking in liquors in quantities of less than five wine gallons."

Motion for injunction denied.

Supreme Court, Kings Special Term, January, 1897. Unreported.

In the Matter of the Application of HARRY W. MICHELL for an Injunction against L. ROTHER.

GAYNOR, J. I would say that it seems to me that it is the duty of the attorney to the special deputy commissioner in all cases like this, to submit a brief suggesting his views of the law. Does he claim that the respondent may not sell at the licensed place

in Queens county goods to be delivered outside the county? The respondent says that the deliveries in Brooklyn that are complained of were upon orders that had been previously made. He does not say where these orders were given, and the sales were effected. I shall, therefore, presume that the orders were taken on the sales in Brooklyn and grant the injunction. Under the law the place of business is licensed. A person with a place licensed in Queens county, by that fact can not make sales outside that county.

County Court, Otsego County. January, 1897. Unreported.

PEOPLE v. JEROME B. WOLCOTT.

BARNUM, Co. J. Demurrer to indictment against defendant charging him with having on the 15th day of January, 1897, at the town of Exeter in this county, unlawfully during the hours between one o'clock A. M. and five o'clock A. M., had a curtain that obstructed the view of the bar or place in a certain building where liquors were kept for sale by the defendant.

Section 31 of Laws of 1896, Chap. 112, under which the indictment is sought to be sustained, so far as material to this case is as follows: "It shall not be lawful for any * * * person whether having paid such tax or not to have during the hours when the sale of liquor is forbidden, any curtain, screen or blinds, opaque or colored glass, that obstructs the view from the sidewalk, alley or road in front of, or from the side or end of the building or the bar or place in such building where liquors are sold or kept for sale."

No penalty or punishment is prescribed for a violation of the provision of the statute above cited, except under the provisions of section 42 (section 34, subd. 5) of the same chapter which reads as follows:

"Section 42 (34 subd. 5). Violations of this act generally. Any wilful violation by any person of any provision of this act for which no punishment or penalty is otherwise prescribed, shall be a misdemeanor."

It is manifest that no crime is committed under the above provision of the statute, unless the act is wilfully done.

It is claimed by the defendant that the indictment does not

charge the commission of a crime because it does not allege that the act was done wilfully.

The people claim that the indictment is in the exact language of the statute and is sufficient.

It seems to me that the exact language of the statute would embrace the words prescribing the conditions requisite to make the act criminal, and that an indictment embracing the substance of the statute should allege that the act was wilfully done.

The use of the word wilfully in the section prescribing a penalty indicates that the intent is an essential ingredient of the crime.

It is said in Rice on Criminal Evidence, 399: "A crime is made up of acts and intent and those must be set forth in the indictment * * *"

As in order to make acts criminal they must be done with a criminal mind, the existence of that criminality of mind must be alleged.

In *People v. West*, 106 N. Y. 295, the indictment accused the defendant of the crime of watering milk and bringing the same to a cheese factory for the purpose of making the same into cheese.

The Court says, "The indictment follows the language of the statute, and the general rule is well settled that an indictment for a statutory offense, and especially when the offense is a misdemeanor, charging the facts constituting the crime in the words of the statute * * * is good as pleading and justified putting the defendant on trial."

But the reasoning of this case does not apply to the case at bar. The indictment, even in case the crime charged is a misdemeanor, where the statute does not make the commission of the act a crime independent of the intent, should charge a criminal intent and the words of the statute declaring the act a crime, if done wilfully, should be embraced in the indictment if the pleader seeks to rely upon the rule as laid down in the case above cited, and in other cases cited by the district attorney.

The intent could have been alleged in general terms but there should be an allegation sufficient to amount to an accusation in effect that the act was wilfully done.

In *People v. D'Argencour*, 32 Hun, 179, (affirmed 95 N. Y. 631), it was objected that the indictment was defective because the intent to defraud was not alleged.

The Court says: "As the statute was framed under which the indictment was found an averment of this intent seems to have been essential, for the acts charged only constitute an offense when they have been committed with the intent to defraud * * * It clearly contemplates the necessity of such an averment, without it the indictment was probably defective."

It was also held that the intent must be alleged in *People v. Lohman*, 2 Barber, 221, affirmed, 1 N. Y. 382.

It was held in *People v. Lowndes*, 130 N. Y. 463, that "while the words used in a statute to define a crime need not be strictly pursued in the indictment, words conveying the meaning of those employed by the statute to express the ingredients of the offense, may be used. Imperfections in matter of form may be disregarded, but the substance of all that is requisite to the offense must be alleged."

In the case at bar it is requisite to make the act complained of a crime, that it be done wilfully.

An essential ingredient of the crime is that the act be done wilfully.

The indictment failing to state that the act was wilfully done fails to charge an essential element of crime under the statute and is fatally defective.

The demurrer is sustained.

County Court, Albany County, January, 1897. Reported. 19 Misc. 96.

Matter of NATHANIEL NILES *v.* MARTIN MATHUSA.

Liquor Tax Law—Assignability of certificate.

A liquor tax certificate is a chose in action capable of assignment, and an assignment thereof to one who advances the money for its purchase is paramount and prior to the claim of a judgment creditor.

APPLICATION for receiver in supplementary proceedings.

Henry A. Peckham, for plaintiff.

Scherer & Downs, for Hinckel Brewing Company, an intervening party.

GREGORY, J. This is a motion for the appointment of a receiver in supplementary proceedings of the defendant's property.

The defendant is a saloon keeper in the city of Albany, and duly obtained a license from the State of New York, in compliance with the Liquor Tax Law, to sell liquor, etc. In order to obtain this license he borrowed the money necessary therefor from the Hinckel Brewing Company and on June 6, 1896, executed and delivered to the brewing company the following instrument in writing:

"I hereby agree to assign, transfer and set over to the Hinckel Brewing Company, on demand, license No. 13,795, taken out in my name for and in consideration of the sum of \$283.33, loaned to me for the purpose of purchasing said license, to be the property of the Hinckel Brewing Company, and until the said sum of \$283.33 is paid in full the license is the property of said company."

The brewing company intervenes upon this motion, and insists that if a receiver of the defendant's property be appointed, the defendant should be ordered, or permitted, to transfer, or assign, the liquor tax certificate to it, and that the injunction issued in the supplementary proceedings be modified to that extent. The plaintiff objects to this, and claims that the title, or rights, under the liquor tax certificate should be transferred to the receiver, taking the ground that the instrument executed by the defendant to the brewing company is merely an agreement by way of collateral security, and there having been no change of position of the mortgaged or assigned property, the agreement is void under the law relating to chattel mortgages. I can not agree with this proposition. The liquor tax certificate is, in my opinion, a chose in action capable of assignment. It is the evidence of a right to do certain things under the statute, and it has a definite and fixed value on the first day of each month prior to its expiration. Chapter 112, Laws of 1896, §25.

It has been well settled in this State that a debt or chose in action may be transferred or assigned, either by parol or writing. "It matters not that the agreement on which the plaintiff relied was by parol and not in writing. The agreement was founded upon an adequate consideration, and is just as valid and effectual as if made in writing. *Risley v. Phenix Bank*, 83 N. Y. 318-328; 38 Am. Rep. 431. Not only can a chose in action be assigned by

parol, but a lien upon it can be created by parol." *Williams v. Ingersoll*, 89 N. Y. 508-521.

The question here involved has, to a certain extent, been considered in at least two cases very recently, in each of which it has been held that an assignment of a liquor tax certificate to one who advances the money for the purchase of the same is paramount and prior to the claim of a judgment creditor. *Herman v. Goodson*, 18 Misc. Rep. 604; *Matter of Jenney, Receiver*, Hiscock, J., at Special Term, at Syracuse. (Not yet reported.)

Let an order be entered appointing a receiver of defendant's property, and modifying the injunction order heretofore granted so as to permit the defendant to transfer and deliver the liquor tax certificate in question to the Hinckel Brewing Company.

Ordered accordingly.

Supreme Court, Onondaga Special Term, January, 1897. Reported.
19 Misc. 244.

Matter of the Application of ALEXANDER D. JENNEY, Receiver, Etc., of JULIUS LENZ, a Judgment Debtor, for a Writ of Mandamus.

1. Excise—Liquor tax certificate—Assignment.

A liquor tax certificate and the rights thereunder are subject to transfer and assignment.

2. Same—Need not be filed.

The statutory provision in relation to filing chattel mortgages does not apply to an assignment of a liquor tax certificate, made to secure repayment of money advanced to pay therefor and for goods purchased, especially as against a receiver of the licensee appointed in supplementary proceedings.

This is an application for a writ of peremptory mandamus directed to the county treasurer of Onondaga county, directing him to cancel a liquor tax certificate issued to the above-named debtor, Julius Lenz, and to pay to said Alexander D. Jenney, as receiver of the property of said Lenz, the *pro rata* amount of the tax paid for the unexpired term of said certificate.

The facts sufficiently appear in the opinion.

Thomas F. Murphy, for application.

S. B. Mead, Horace White and J. L. Cheney, opposed.

HISCOCK, J. On or about May 5, 1896, a judgment was recovered against Julius Lenz, and thereafter and on or about September 12, 1896, in supplementary proceedings instituted upon said judgment, Alexander D. Jenney was appointed receiver of the property of said judgment debtor. July 1, 1896, a liquor tax certificate in the ordinary form was issued to the judgment debtor, which has ever since continued in full force and effect. September 18, 1896, the receiver obtained possession of said certificate (it being disputed whether by the voluntary act of the debtor or not) and thereafter and before this application in proper form made application to the county treasurer to surrender said certificate and receive the unexpired *pro rata* amount thereof, which application was refused.

Several reasons were urged upon the motion why the application for the writ of mandamus asked for should be denied, but inasmuch as one of them seems more important than the others and to be decisive of the application, consideration will be limited to that. The reason and defense referred to is that arising from and connected with the instruments executed by the judgment debtor to the Bartels Brewing Company and its president relating to the liquor tax certificate in question before the petitioning receiver was appointed or acquired any rights therein.

At the time such certificate was taken out the Bartels Brewing Company advanced to the judgment debtor the sum of \$208.33, for the purpose of enabling him in part to pay the tax on the business of trafficking in liquor and to take out the certificate in question, and Lenz executed and delivered to said company his promissory note for said amount. At the same time said Lenz executed two instruments, one of them running to said Bartels Brewing Company and the other to the president of said company and his successors. These instruments are quite full and in detail and in substance by them Lenz assigned, transferred and set over to said company, its successors and assigns, all his right, title and interest in and to the liquor tax certificate in question and all moneys to be refunded upon the surrender thereof, as collateral security for the payment of the above promissory note and any and all renewals thereof, and also as security for the payment of all beer, etc., which he might purchase on credit from said company, and generally for any other evidences of debt or balances of account or other indebtedness which should at any time be due and owing said company from him; and also

appointed the president of said company his attorney irrevocable, to sell, assign, transfer and set over to any person, persons or corporation he might choose all his right, title and interest in and to said liquor tax certificate, and his attorney to surrender at any time the said certificate to the said county treasurer and receipt for the *pro rata* amount of the tax paid to be refunded for the unexpired term thereof and to discontinue and cease the traffic in liquors under said certificate, and for that purpose to close up the premises where the business was to be carried on, and to apply all moneys refunded in payment of the above-mentioned note and indebtedness, express power being given to enter upon the premises where said certificate might be held or placed and to take and carry away and deliver or otherwise dispose of the same to carry out the purposes of said attorneyship.

These instruments were never placed on file as a chattel mortgage and no act had been done under them with reference to surrendering said certificate and securing a repayment thereunder from the county treasurer. Notice of them, however, had been duly given to the county treasurer before the application of the receiver for surrender and it was undisputed that at that time the indebtedness intended to be secured by them was in excess of the amount due by way of repayment.

It is urged in behalf of the receiver that these instruments are not effective to keep the rights of Lenz under the certificate away from him for the reasons:

First. That the certificate and rights thereunder were not subject to transfer and assignment such as was attempted; and

Second. That if they were, the instruments in question amounted to a chattel mortgage and were void by reason of failure to file, etc.

The conclusions reached are adverse to the receiver and in favor of the assignee and transferee of Lenz upon both of these questions.

There probably is no question that ordinarily and under the Excise Law as it formerly stood the payment of a license fee for transacting the liquor business would secure to the one paying it a personal right and privilege to transact such business which would not be subject to transfer and assignment, such as is claimed by the brewing company here. The Liquor Tax Law, however, was evidently intended to change this and to give a certificate issued under it and the rights of surrender and repay-

ment under such certificate, the status of property invested with the qualities of being assigned, transferred and disposed of.

By section 25 it is provided that the person holding such certificate may surrender it and have refunded the *pro rata* amount of the tax paid for the unexpired term. By section 27 it is provided that a person to whom such certificate is issued may sell, assign and transfer it and that the assignee may thereupon carry on the business for which such certificate was issued. By another clause of section 25 it is provided that if a corporation, association or copartnership holding a liquor tax certificate shall be dissolved or a receiver or assignee be appointed therefor, or a receiver or assignee of the property of a person holding a liquor tax certificate be appointed during the time for which such certificate was granted, or a person holding a liquor tax certificate shall die during the time for which such tax certificate was given, such corporation, association, copartnership or receiver or assignee, or the administrator or executor of the estate of such person or the person or persons who may succeed to such business, may surrender such liquor tax certificate or continue to carry on the business thereunder.

Under these provisions there would not seem to be any doubt that there had been conferred upon and attached to a certificate the quality and power of being transferred and assigned as was done in this case. In fact, one of the provisions above quoted would seem to specifically authorize what has been done in this case, for in that clause conferring rights upon "a receiver or assignee of the person holding a liquor tax certificate * * * appointed during the time for which such certificate was granted," it would be a narrow construction, especially in view of the broad and general provisions of the statute, to hold that the word "appointed," referred exclusively to a receiver or assignee named in proceedings hostile to the owner of the certificate and did not as well apply to an assignee appointed by the holder himself as in this case. It was intended by the parties to make the instruments under consideration irrevocable. They were executed and delivered for value and very likely are so, but that question is not presented here, for the assignor has expressly appeared on this application and by his affidavit not only has not repudiated the transfers but has recognized and ratified them.

I pass to the second question above suggested, whether these instruments should have been filed as a chattel mortgage to make

them effective as against the receiver. The receiver simply took and has the rights left to Lenz at the time the receivership was created. No question is presented such as would arise between the Bartels Brewing Company and a subsequent *bona fide* transferee of Lenz for value and without notice of the prior assignment. The only contention is that these transfers amounted to a chattel mortgage and that, therefore, they are void under the express statutory provisions relating to the filing of chattel mortgages. It is quite clear, however, both from the reading of the statute itself and from the authorities relating to similar statutes, that it does not apply here and that it was not necessary to file the assignment and power of attorney.

The statute invoked reads as follows: "Every mortgage or conveyance intended to operate as a mortgage of *goods and chattels* hereafter made which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the *things* mortgaged shall be absolutely void, etc."

It is obvious that this act is not intended to apply to mortgages upon all species of personal property, but that the terms used of "goods and chattels," and "things" include and refer only to personal property which is visible, tangible and movable and not to mere choses in action.

This contention is amply sustained by the following authorities relating to the meaning of the same and similar statutes and words: *Williamson v. New Jersey Southern R. R. Co.*, 26 N. J. Eq. 403; *Bacon v. Bonham*, 27 id. 209; *Kilbourne v. Fay*, 29 Ohio St. 264; *Marsh v. Woodbury*, 1 Metc. 436; *Kirkland v. Brune*, 31 Gratt. 126, 131; *Passaic Mfg. Co. v. Hoffman*, 3 Daly, 495, 513; *Putnam v. Westcott*, 19 Johns, 73.

It has even been held that the filing or refiling of a chattel mortgage is not necessary to secure its validity as against a receiver in supplementary proceedings. *Steward v. Cole*, 4 N. Y. St. Repr. 428.

In accordance with the foregoing views and conclusions, the application for a peremptory writ of mandamus is denied, with ten dollars costs.

Application denied, with ten dollars costs.

Supreme Court, Seneca Special Term, January, 1897. Reported.
19 Misc. 340.

Matter of the Petition of SAMUEL H. SALISBURY, for an Order
Revoking and Cancelling the Liquor Tax Certificate of PATRICK
H. LYONS.

Matter of the Petition of SAMUEL H. SALISBURY, for an Order
Revoking and Cancelling the Liquor Tax Certificate of MARTHA
E. ACTON.

Excise—Liquor tax—Exceptions.

The general exception in section 24 of the Liquor Tax Law of 1896, as to places in which the liquor traffic was carried on at the time of the passage of the act, qualifies both subdivisions of that section, and applies to hotels and places devoted to the liquor traffic which are within one-half mile of a penal institution, protectory, industrial school, asylum, state hospital or poorhouse, and at least one-half mile from the nearest boundary of an incorporated village or city.

SPECIAL proceedings brought under section 28 of the "Liquor Tax Law" to revoke liquor tax certificate No. 33,782, issued by Maynard T. Corkhill, county treasurer of Seneca county, to Patrick H. Lyons, on the 6th day of November, 1896; and the liquor tax certificate No. 30,480, issued by said county treasurer to Martha E. Acton, on the 17th day of October, 1896. The facts in both cases are the same and are undisputed. The only question in either case arises upon the construction of section 24 of said act. By stipulation of opposing counsel both cases were argued and submitted as one case and will be so treated in deciding the same.

Mead & Stranahan, for petitioner.

Daniel Moran, for respondents.

WERNER, J. Each of said respondents was, at the time of the passage of the law known as the "Liquor Tax Law," lawfully engaged in conducting a hotel in the town of Romulus, Seneca county, N. Y., within one-half mile of "Willard State Hospital," which is an institution owned by the public and in which the State of New York keeps and cares for its dependent insane; and neither of said hotels is within an incorporated village or city.

or within one-half mile of the nearest boundary of any incorporated village or city. The application for the revocation of said certificates is made on the ground that material statements in the applications for the same were false, and on the further ground that the holders thereof are not legally entitled thereto. The statements in said applications which are alleged to be false are as follows:

“10. May the applicant or applicants lawfully carry on such traffic on said premises under such subdivision?” Subd. 1, § 11. “Yes.”

“11. Is the applicant or either of them within any of the prohibitions of said act?” “No.”

The alleged falsity of these statements, which are the same in both applications, is predicated upon the language of said section 24, which we are asked to construe, and which reads as follows:

“§ 24. Place in which traffic in liquor shall not be permitted.—Traffic in liquor shall not be permitted:

“1. In any building owned by the public, or upon any premises established as a penal institution, protectory, industrial school, asylum, state hospital or poorhouse, and if such premises be situated in a town and outside the limits of an incorporated village or city, not within one-half mile of the premises so occupied, provided there be such distance of one-half mile between such premises and the nearest boundary line of such village or city; nor

“2. Under the provisions of subdivision 1 of section 11 of this act, in any building, yard, booth or other place which shall be on the same street or avenue and within two hundred feet of a building occupied exclusively as a church or a schoolhouse; the measurements to be taken from the center of the nearest entrance of the building used for such church or school to the center of the nearest entrance of the place in which such liquor traffic is desired to be carried on; provided, however, that this prohibition shall not apply to a place which is occupied for a hotel, nor to a place in which such traffic in liquors is actually lawfully carried on when this act takes effect, nor to a place which at such date is occupied, or in process of construction, by a corporation or association which traffics in liquors solely with the members thereof, nor to a place within such limit to which a corporation or association trafficking in liquors solely with the members

thereof when this act takes effect may remove; provided, however, such place to which such corporation or association may so remove shall be located within two hundred feet of the place in which such corporation or association so traffics in liquors when this act takes effect."

In the effort to ascertain the legislative intent in the passage of the "Liquor Tax Law," certain well-settled rules of statutory construction, which are of general application, must be invoked. The first of these is, that the intention is to be deduced from a view of the whole statute, and that intention, when ascertained, will always prevail over the literal sense of the terms. *Matter of Brooklyn Bridge*, 72 N. Y. 529. Or, as the rule is stated in *Smith v. People*, 47 N. Y. 330, "In the construction of statutes, effect must be given to the intent of the legislature whenever it can be discerned, though such construction seems contrary to the letter of the statute"; and again, in *Hayden v. Pierce*, 144 N. Y. 516, "Language, however strong, must yield to what appears to be the intention, and that is to be found, not in the words of a particular section alone, but by comparing it with other parts or provisions of the general scheme of which it is a part."

Applying these rules of statutory construction to the case before us, let us briefly examine the purpose and scope of the statute as a whole, and also the provisions of certain separate sections thereof, before devoting our attention to the language of section 24. The evident purpose of the legislature, as disclosed by the context of the whole act, was to completely change the system under which the liquor traffic had previously been carried on, without invading or abridging the vested rights of persons lawfully engaged in said traffic at the time of the change in the law. Whether those lawfully engaged in said liquor traffic at that time had in fact any vested rights in the premises it is not necessary now to determine. It is perfectly clear that the legislature, in the sweeping changes created by its enactment of chapter 112 of the Laws of 1896, sought to minimize the hardships incident to this revolution in the law, by certain well-defined exceptions to the stringent provisions of the statute in favor of those lawfully engaged in the liquor traffic at the time of the passage of said act. These exceptions evince a disposition on the part of the legislature to deal as equitably as the enforcement of the new law would permit with those who had lawfully acquired rights or privileges under the old law.

Under section 4 of said act, licenses lawfully granted under previous statutes which were valid on March 23, 1896, when this act took effect, were continued in force until June 30, 1896. Section 17, subdivision 6, of said act requires the written consent of the owner of the premises in which the traffic in liquor is to be carried on to be filed simultaneously with the application for the tax certificate, "except in cases where such traffic in liquors was actually lawfully carried on in said premises so described in said statement at the time of the passage of this act, in which case such consent shall not be required." Subdivision 8 of the same section makes it necessary to obtain the consent of the owners of buildings occupied exclusively as dwellings which are within two hundred feet of the premises in which the traffic in liquors is to be carried on, but "such consent shall not be required in cases where such traffic in liquors is actually lawfully carried on in said premises so described in said statement when this act takes effect."

The language of the second part or subdivision of said section 24 concededly excepts from its operation hotels and places in which the traffic in liquors was actually lawfully carried on when this act took effect, which were within two hundred feet of churches or schoolhouses. If, as appears from the language of these sections just quoted, it was the purpose of the legislature to ameliorate, so far as possible, the condition of those engaged in the liquor traffic at the time of the passage of this act, by relieving them from the hardships and apparent inequities of the sudden and sweeping changes in the law, it is quite impossible to discern, either in the language of the sections just quoted or in the general context of the act, any intent to discriminate against hotel-keepers or dealers in liquors whose places of business were within one-half mile of any of the institutions enumerated in subdivision 1 of section 24. It is difficult to understand upon what theory the legislative intent to effect such a result could be reconciled with the saving clauses in favor of hotels, saloons and clubs, which, at the time of the passage of this act, were in operation within two hundred feet of schoolhouses or churches. If there were good reasons for the reservation of privileges to those who were, at the time this law went into effect, actually lawfully engaged in the liquor traffic within two hundred feet of the schoolhouse or church, there are quite as cogent reasons for similar reservations in favor of those who, at the same time,

were actually engaged in said business within one-half mile of any of the said enumerated public institutions and at least one-half mile distant from the nearest boundary of an incorporated village or city.

We could, if it were necessary, readily suggest several obvious arguments in favor of discrimination against places devoted to the liquor traffic within two hundred feet of a church or schoolhouse which could not, with the same urgency or logic, be applied to such places located within said one-half mile limit.

But this feature of the discussion is so transparent that it seems to us a work of supererogation to dwell longer upon it. We think it is clearly consonant with the spirit of the act to hold that the same reservation which is conceded to apply to hotels and places devoted to the liquor traffic which were within two hundred feet of a schoolhouse or church at the time of the passage of this act, applies to hotels and places devoted to the liquor traffic which were within one-half mile of the institutions enumerated in subdivision 1 of said section 24 and at least one-half mile from the nearest boundary of an incorporated village or city.

If it were necessary, it would be the duty of the court, within the rules of statutory construction above enunciated, to read into said section 24 such an express proviso in favor of hotels and places devoted to the liquor traffic within said one-half mile limit in which the liquor traffic was actually lawfully carried on at the time of the passage of this act, as to bring the same into harmony with the evident spirit and purpose of the whole act and to make effectual the palpable intent of the legislature. But the court does not seem to be driven to this extremity. The plain interpretation of said section 24, when read as a whole and fairly construed, is that there is but one prohibition, which is contained in a single, independent, principal clause, to wit: "Traffic in liquors shall not be permitted." This arbitrary prohibition is followed by an enumeration of the places to which it applies, to wit: The institutions designated in the first dependent or subsidiary sentence; and the places named in the second dependent or subordinate clause. These two latter clauses are not dependent upon each other, but have a common dependence upon the first or principal sentence. Then follows the proviso which is not in terms limited to the places named in the second dependent sentence and which, so far as it applies to this case, reads as follows:

“Provided, however, that this prohibition shall not apply to a place which is occupied for a hotel, nor to a place in which such traffic in liquors is actually lawfully carried on when this act takes effect.” The portion of the sentence which follows that just quoted refers entirely to clubs and is as independent of and unconnected with the general proviso sought to be invoked in protection of the respondent’s rights herein, as though it were in fact an entirely separate sentence in a distinct paragraph.

Although the punctuation and division of sentences will ordinarily be made to yield to the obvious spirit of a statute, there is, in the present case, apparently no necessity for the application of this rule. With much greater care than is ordinarily evinced in the composition of laws, the legislature seems to have so coordinated the punctuation of the letter with the spirit of the statute as to remove all doubts concerning its construction, when tested by the rules of correct rhetoric. The division of the dependent clauses from each other by semicolons and their separation from the clause from which they both depend by a comma, is in itself an indication of the legislative intent to treat the proviso above referred to as applicable to the subject-matter of each dependent clause. If the legislature had intended to limit said proviso to the second dependent clause, it could certainly have more clearly expressed a purpose so plainly antagonistic to the spirit of the whole statute. But even if there were doubt as to the technical correctness of the composition of this statute the court would still be at liberty, and indeed called upon, in construing the same, to adhere to the plain, common-sense interpretation of the words in the effort to ascertain the true spirit and meaning thereof, and when that is done the refined, technical rules of grammar and rhetoric must yield if justice requires it.

The statements in said applications, which are challenged as false, were in fact true under our construction of this statute, and these proceedings must, therefore, be dismissed, with \$20 costs in favor of each respondent.

Ordered accordingly.

County Court, Onelda County, February, 1897. Reported. 19 Misc. 458.

THE PEOPLE v. ALEXANDER SCHMIDT and EVA SCHMIDT.

Indictment—Violation of Excise Law.

An indictment which charges that on a specified day two persons named "wilfully and maliciously, wrongfully and unlawfully did sell and cause to be sold distilled, etc., liquors, ale, beer and wine in quantities less than five gallons at a time by retail and to be drank on the premises, to Y., Z. and to divers other persons whose names are to the grand jury unknown," without having paid excise taxes and without having a liquor tax certificate therefor, and not being authorized thereto by law, charges a joint sale to the persons named and the persons unknown by the defendants jointly, and is not demurrable as joining two crimes.

DEMURDER to indictment.

The above-named defendants are indicted for violating the Liquor Tax Law. The indictment charges that on the 29th day of July, 1896, at the city of Utica, N. Y., the said Alexander Schmidt and Eva Schmidt wilfully and maliciously, wrongfully and unlawfully did sell and cause to be sold distilled, rectified, spirituous, fermented and malt liquors, ale, beer and wine in quantities less than five gallons at a time by retail and to be drank on the premises, to William Yates, Hannah Calahan and to divers other persons whose names are to the grand jury unknown, and then and there did deliver and cause to be delivered in pursuance of such sale to the said William Yates, Hannah Calahan and to said divers other persons, etc., said liquors, wines, ale and beer, to wit, one gill of wine, one gill of brandy, one gill of rum, one gill of gin, one gill of whisky, one gill of cordial, one gill of bitters, one gill of ale, one gill of porter, one gill of beer, one gill of lager beer and one gill of a certain strong spirituous and fermented liquor to the grand jury aforesaid unknown, without having paid excise taxes upon the business of trafficking in liquors and without having a liquor tax certificate therefor and not being authorized thereto by law.

The defendants demurred to said indictment upon the ground that the indictment charges one crime against defendant Alexander Schmidt and a separate and distinct crime against Eva Schmidt, and that the crimes being distinct and separate cannot be united in one indictment.

Also upon the further ground that more than one crime is charged in the indictment.

George S. Klock, district attorney, for People.

James Coupe, for defendants.

DUNMORE, J. Section 33 of the Liquor Tax Law provides that any clerk, agent, employee or servant shall be equally liable as principals for any violation of the provisions of that act.

Defendants contend that one of these defendants was acting as clerk or agent for the other, or else defendants must have been copartners, and that any sale made by one was a distinct and separate crime by that one and that the person so offending must be proceeded against separately. That doubtless would be true providing defendants' premises were correct, but this indictment alleges that defendants jointly committed the offense.

In disposing of the demurrer we must assume that allegation to be true. If defendants jointly committed the offense as alleged they are properly joined in the indictment.

The remaining ground of demurrer is, as defendants contend, that the indictment alleges more than one sale and delivery, to wit: One to William Yates, one to Hannah Calahan and one or more to the other persons who are unknown.

If the indictment alleged separate sales to the persons named the defendants' objection would be good, but the fact is that the indictment charges a joint sale to the persons named and the persons unknown.

That this objection is not good as to an indictment in the form of the one at bar has been settled in this State for many years. In *People v. Adams*, 17 Wend. 475, the indictment charged that the defendant, *on June 1st, 1836, and on divers other days and times*, sold by retail to *divers citizens of this State* and to *divers persons* to the jurors unknown, etc. It was held that only one sale was alleged and that consequently the objection that more than one crime was alleged was not well taken. Chief Justice Nelson, in his opinion, says: "Upon our view of the time when the offense is laid in the indictment, that is upon the day given, but one sale by retail is to be deemed charged in the count, the three gills of brandy, three gills of rum, etc., are to be viewed as having been sold at one and the same time, and as constituting but one transaction. It is a description of various sorts of liquors,

with a view to avoid the difficulty of a possible misdescription of the article sold."

That case was followed and the same rule reasserted in *Osgood v. People*, 39 N. Y. 449.

The demurrer is overruled.

Ordered accordingly.

Supreme Court, Kings Special Term. February, 1897. Unreported.

In the Matter of the Application of EMILY G. SMITH to revoke the Liquor Tax Certificate of ROLAND P. MERRILL.

DICKEY, J. S. C. From a careful reading of the testimony taken before the referee, I am satisfied that material statements in the application of the holder of the certificate were false, and that he was not entitled to a certificate. His statement that only one dwelling was within two hundred feet of his saloon, and his attaching the consent of Philip E. Schenck as the owner of that dwelling, was a false statement. That dwelling was not within two hundred feet, but the dwelling of this petitioner was within that distance.

While his statement was true as to one dwelling being within the distance, he has not the consent of that owner, so he was not entitled to a certificate. There are plenty of places where liquor is now sold, without starting new places within two hundred feet of property used exclusively for dwellings, and it will do no harm to have it authoritatively understood that certificates will be revoked by courts unless the law is strictly complied with.

This certificate must be revoked and cancelled, with \$25.00 costs and disbursements against him.

Supreme Court, Kings Special Term, February 15, 1897. Unreported.

PEOPLE ex rel. CHARLES REUSSE v. HARRY W. MICHELL for a Writ of Mandamus.

DICKEY, J. This is an application for a writ of mandamus to compel the Special Deputy Commissioner of Excise of Kings county to issue a transfer of an excise license from Herman Heincke to Charles Reusse. It is my opinion that the exception in subdivision 6 of section 17 of the Raines Law applies only to

such tenants of liquor stores, who were such at the time of the passage of the act. The intention of the lawmakers was to save them the necessity of getting the consent of the landlord, who had already leased them the premises to carry on the liquor business; but when a stranger to the owner applies for leave to carry on the business, I am convinced the law intended in such cases that the consent of the landlord should first be obtained, for while the owner of the property might consent that one man well known to him might carry on the liquor business in his building, it might well be that he would seriously object to another doing so. The manner of keeping a liquor store depends largely on the keeper. The law is meant to be restrictive in a measure, and the requirement that owners of buildings should consent before business may be carried on is a proper restriction.

Motion denied.

First Appellate Department, February, 1897. Reported. 14 App. Div. 461.

MAX AUGNER, Appellant, *v.* THE MAYOR, ALDERMEN AND COMMON-
ALTY OF THE CITY OF NEW YORK, Respondent.

An action to recover from a city moneys paid to it for a license—After revocation it is returnable to the licensee, to the extent of the unexpired term—Implied contract to return the money—Judgment may be taken without application to the court.

A complaint, based upon section 4 of chapter 112 of the Laws of 1896, known as the Liquor Tax Law, alleged that the plaintiff, on or about the 21st day of October, 1895, applied to the board of excise of the city of New York for a liquor license; that the board issued to him, upon his payment of \$200, a license which by its terms expired in one year; "that pursuant to the provisions of the Liquor Tax Law this plaintiff is entitled to receive from the defendant the sum of sixty-one dollars, which is a proportionate share of the license fee paid as aforesaid for the unexpired term which the said license had to run after the 30th day of June, 1896" (the date when it was terminated by the Liquor Tax Law), and demanded judgment against the city for the sum of sixty-one dollars and interest.

Held, that the complaint stated a cause of action upon an implied contract, based upon the obligation of the city of New York to repay to the plaintiff money which it had received, but which it was not justly entitled to retain.

That the action was one which came within the provisions of section 420 of the Code of Civil Procedure, and that judgment might be taken by the plaintiff without application to the court.

Barrett and Rumsey, JJ., dissented.

APPEAL by the plaintiff, Max Augner, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of December, 1896, denying his motion for judgment in the action.

The action was brought to recover from the defendant the sum of \$61, the proportionate part of a license fee of \$200, for the period from June 30, 1896, to October 21, 1896, for which a right of action was given to the plaintiff by section 4 of the Liquor Tax Law, being chapter 112 of the Laws of 1896.

Charles Goldzier, for the appellant.

George O'Reilly, for the respondent.

INGRAHAM, J.: We have here to determine whether the complaint in this action sets forth a cause of action which consists of "an express or implied contract to pay money received or disbursed, or the value of property delivered, or of services rendered by, to or for the use of, the defendant or a third person, and thereupon demands judgment for a sum of money only." (Code Civ. Proc. §420.) It is difficult to understand what was meant by the language here quoted. The meaning would be clear if the words "received or disbursed" were omitted. Reading the whole section together, however, it would seem as if it was intended to allow a judgment to be taken without application to the court in a case where the action was either for the breach of an express contract to pay, absolutely or upon a contingency, a sum or sums of money, fixed by the terms of the contract, or capable of being ascertained therefrom, by computation only, or an express or implied contract to pay money or the value of property delivered, or of services rendered, where the complaint demands judgment for a sum of money only. In such a case the complaint setting forth the cause of action must set forth the facts which show either an express contract, or facts from which the law raises the implication of a contract to pay a definite sum of money. There the defendant has notice of the foundation of the alleged obligation, and the amount of money for which the plaintiff asks judgment. By a failure to answer such a cause of action the defendant in substance consents to a judgment for the sum of money demanded, and in such a case no application to

the court is necessary, for the amount of the judgment can not exceed the amount specifically demanded in the complaint. Does the complaint in this action allege a cause of action based upon an express or implied contract to pay money? If it does, I think the case comes within the section of the Code before cited. The complaint alleges that on or about the 21st day of October, 1895, the plaintiff applied to the board of excise of the city of New York for a license permitting him to carry on business upon the premises No. 53 First street, and that upon payment by him to the board of excise of the sum of \$200 as a license fee, the said license was duly issued to this plaintiff, which, by its terms, expired on the 20th day of October, 1896; that pursuant to the provisions of the Liquor Tax Law, this plaintiff is entitled to receive from the defendant the sum of \$61 which is a proportionate share of the license fee paid as aforesaid for the unexpired term which the said license had to run after the 30th day of June, 1896, and a judgment was demanded against the city of New York for the sum of sixty-one dollars with interest.

By section 4 of the Liquor Tax Law (Chap. 112, Laws of 1896) it is provided that "When a license is terminated on the thirtieth day of June, eighteen hundred and ninety-six, as above provided, the holder of such license shall be entitled to receive and recover from the town or city in which such license was granted, such proportion of the whole license fee paid therefor, as the remainder of the time for which such license would otherwise have run, shall bear to the whole period for which it was granted, and the same shall be paid by such town or city on demand." The action, therefore, is brought to recover under this provision of the statute a proportionate amount of the sum of money which the plaintiff had paid for a license which had been abrogated by law on the 30th day of June, 1896. In other words, a license having been granted by the State to sell liquor for a certain period, and the State having abrogated that license before the period had expired, recognizing the justice of the plaintiff's claim to have refunded to him the proportionate amount of the license fee paid, where the privilege accorded by the license had been withdrawn, places upon the town or city in which such license was granted the obligation to repay the amount which the plaintiff had paid for his license, but for which he had received no consideration, the license having been abrogated. Is this a cause of action upon an implied contract to pay money received? It seems to me that

there is no doubt but that there would be such an implied contract if the complaint had alleged that the defendant had received for its own use this money so paid by the plaintiff for the license. It here appears that by law the board of excise is required to deposit with, and pay over to, the chamberlain of the city of New York all money received for licenses within thirty days after it is received (see chap. 145, Laws of 1879, amending §2, chap. 175, Laws of 1870), and we can assume that these public officers have done their duty and obeyed the law.

In the case of *The People ex rel. Dusenbury v. Speir* (77 N. Y. 150), in defining what is an implied contract, it is said: "There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right and the other should be subject to a liability similar to the rights and liabilities in certain cases of express contract." As was said in *Moses v. Macferlan* (2 Burr. 1008), "*If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt and gives this action founded in the equity of the plaintiff's case as it were upon a contract.*" In this case we have the payment by the plaintiff of the license fee; the duty of the board to pay that money, within thirty days after it was received, to the chamberlain; and a provision of the statute which requires that a proportion of that money be paid to the plaintiff by the city of New York. Upon that obligation thus created by statute an action is brought. It seems to me that this is clearly an action upon an implied contract; a contract based upon the obligation of the city of New York to repay to the plaintiff money that it had received but which it was not justly entitled to retain, because the consideration for which it had been paid, viz., the right from the 30th of June until October 20, 1896, to carry on business under the license granted had been taken away by the legislature. There is nothing here that imposes upon the city of New York the payment of any sum of money as a penalty. The act itself does not create the liability, but directs the municipal corporation to discharge the obligation which in justice existed against it, to repay to the plaintiff the money that it held of his and for which he had received no consideration. The mere fact that the complaint does not allege that the money was actually received by the defendant does not prevent this obli-

gation to do what is just, imposed on the defendant by the legislature, from being an obligation in the nature of an implied contract. The legislature, I think, undoubtedly assumed, in making the city liable, as we are, I think, entitled to assume upon this appeal, that these boards of excise, who were public officers, had performed the duty required of them by law, and have paid the money to the chamberlain, who held it as the money of the city, to be applied by the city according to law. It is clear that this ruling will carry out the intent of this section of the Code, the sole object of this application being to entitle the plaintiff in those suits to obtain a greater amount of costs against the city of New York than they would be entitled to if the action was one which would have come under the section of the Code above cited; and as the action is within both the letter and spirit of this section, and as the city objects to the application, not to prevent the plaintiff from obtaining a judgment which it can obtain, but simply to prevent the defendant's recovering in all those suits costs against the city on the higher scale provided for in actions which require an application to the court for judgment, I do not see why a strained construction should be given to this section not necessary to fully protect the city, and which would only result in largely increasing the liability of the city for costs.

I think the order appealed from should be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., and O'BRIEN, J., concurred; BARRETT and RUMSEY, JJ., dissented.

BARRETT, J. (dissenting):

This action is upon what has been aptly termed a *quasi* contract. It is not upon a genuine contract, that, is, an agreement, in fact, between plaintiff and defendant, either express or implied. It is simply upon a statutory liability, which is sufficient to sustain an action analogous to what was formerly called *assumpsit*. "That feature," as Judge ALLEN said in *McCoun v. N. Y. C. & H. R. R. Co.* (50 N. Y. 180), "does not suppose a contract, but simply a promise *ex parte*." In the classification of actions this is undoubtedly an action *ex contractu* and not *ex delicto*. But that does not settle the present question, which is, whether an action upon an obligation arising

solely *ex lege* — though proceeding in form *ex contractu* — is contemplated by section 420 of the Code of Civil Procedure. There are many actions upon contract — actual even — which are not within this section. In fact the contracts, whether express or implied, which come within it are strictly limited. They are, *first*, an express contract to pay money fixed by its terms, or capable of being ascertained therefrom by computation only. That, certainly, is not this case. *Second*, an express or implied contract to pay money received or disbursed, or the value of property delivered, or of services rendered by, to or for the use of the defendant or a third person. This case cannot come within the two latter alternatives. It has nothing to do with property delivered or services rendered. The claim is, that it comes within the earlier specification, namely, “to pay money received or disbursed.” As there is no charge in the complaint of the disbursement of money, the point is reduced to its receipt. Does the complaint, then, aver the defendant’s breach of an “implied contract to pay money received” by it? There is no other possible phase of the section which bears upon the question presented. The complaint certainly does not aver even an implied contract to pay money received “to, or for the use of” the defendant or a third person. It either alleges money received “*by*” the defendant, or it alleges nothing which is within the section. What, then, is the feature of the contract to which this language refers? Clearly, money received by the defendant *to the use of the plaintiff*, that is, money which, upon its receipt by the defendant, becomes due and payable to the plaintiff, and so becomes due and payable under some contract between them, either express or implied. This means a contract between the parties, an actual contract in fact, whether the promise to pay be direct or inferential. “An implied promise,” to again quote Judge ALLEN in the case cited *supra*, “or contract is but an express promise proved by circumstantial evidence.” It is clear that the codifier here was not dealing with legal fictions invented to sustain remedies *ex contractu* upon liabilities which rest upon naught save statutory mandate, pure and simple. The intention was to limit those cases where a plaintiff might enter his judgment without the revisory consideration of the court to breaches of the few simple and actual contracts carefully enumerated in the section. In other Code instances we find no such limitation. For example, a warrant of attachment may issue in an action

for the breach of any contract whatever, express or implied, except a contract to marry. (Code, § 635.) But the construction given to even this unlimited provision favors the view that the contract, express or implied, referred to in this latter section is a contract founded upon consent, that is, upon the actual meeting of minds; in other words, a contract between the parties in the ordinary and proper sense of this term, and not a mere legal fiction which forces a party to do something which he has never agreed to do. Thus, in *Remington Paper Company v. O'Dougherty* (96 N. Y. 666, affg. 32 Hun, 255) it was held that an attachment under section 635 would not lie in an action brought under section 3247 of the Code to recover the costs of a former action which was prosecuted by the defendant in the name of a third person for her benefit. The presiding justice (SMITH) at General Term said that "the defendant has made no contract with the plaintiff or its assignors; she is liable only *by the provisions of the statute.*" A different view was subsequently taken by the Court of Appeals of an action upon a judgment (*The Gutta Percha & Rubber Mfg. Company v. Mayor*, 108 N. Y. 276), thus making a distinction — the point of which it is difficult to perceive — between the fiction of a promise founded upon a legislative mandate and that founded upon a judicial mandate. The same court had previously held that a judgment was not a contract within the meaning of an act reducing the rate of interest, but reserving from its operation "any contract or obligation" made prior to its passage. (*O'Brien v. Young*, 95 N. Y. 428.) It had also held in *The People ex rel. Dusenbury v. Speir* (77 N. Y. 144) that the phrase "contract, express or implied," as used in the old Non-imprisonment Act (Laws of 1831, chap. 300), referred to a contract resulting from the voluntary arrangement of the parties, and not one implied by law for the purpose of giving a remedy for the wrong. Judge DANFORTH said in that case that the implied contract referred to in the statute is one where "the intention of the parties, if not expressed in words, may be gathered from their acts and from surrounding circumstances"; and, whether express or thus implied, "must be the result of the free and *bona fide* exercise of the will producing the '*aggregatio mentium*,' the joining together of two minds, essential to a contract at common law." The learned judge added: "There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality

entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, similar to the rights and liabilities in certain cases of express contract. * * * Therefore, these facts are called *quasi* contracts, because, without being contracts, they produce obligations in the same manner as actual contracts." * The conclusion there was that the statute did not embrace obligations of the latter class. To the like effect are *Louisiana v. Mayor of New Orleans* (109 U. S. 285) and *Steamship Company v. Joliffe* (2 Wall. 450). The same point was directly involved in *Inhabitants of Milford v. Commonwealth* (144 Mass. 64). The Superior Court was given jurisdiction by statute "of all claims against the Commonwealth which are founded in contract for the payment of money," and it was there held that this jurisdiction did not extend to an obligation imposed by law upon the Commonwealth to reimburse the expense incurred by a town in the support of a State pauper. FIELD, J., observed that "a contract is sometimes said to be implied when there is no intention to create a contract, and no agreement of parties, but the law has imposed an obligation which is enforced as if it were an obligation arising *ex contractu*. In such a case there is not a contract, and the obligation arises *ex lege*."

In England these *quasi* contracts are no longer confused with "implied contracts." Lord Justice COTTON, in *Rhodes v. Rhodes* (44 Ch. Div. 94), referring to the nature of the obligation incurred by a lunatic for necessities supplied, declared that "the term 'implied contract' is a most unfortunate expression, because there cannot be a contract by a lunatic." "It is asked," observed that learned judge, "can there be an implied contract by a person who cannot himself contract in express terms? The answer is that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessities." (See also, *Trainor v. Trumbull*, 141 Mass. 527; *Cunningham v. Reardon*, 98 id. 538; *Read v. Legard*, 6 Exch. 636.)

Looking at the present complaint in the light of reason and authority, as applicable to the statute under consideration, what do we find? An allegation that the plaintiff paid \$200 to the former board of excise of the city of New York for a license to sell spirituous liquors for one year, and that, "pursuant to the

provisions of the Liquor Tax Law, this plaintiff is entitled to receive from the defendant the sum of sixty-one 00-100 dollars, which is a proportionate share of the license fee paid as aforesaid for the unexpired term which the said license had to run after the 30th day of June, 1896." There is no allegation that the city received the original fee, though that may be inferred, because of the presumption that public officers have done their duty. The board, in granting the license, "were not exercising a jurisdiction as agents of the corporation." (*The People ex rel. Einsfeld v. Murray*, 149 N. Y. 375, 376.) But there certainly is no allegation, either direct or indirect, that the city *received the license fee to the use of the plaintiff*. It was paid by the plaintiff to the board, and, if received by the defendant, was so received for public purposes. Under the law the city was bound to pay out of these excise moneys to the Home for Fallen and Friendless Girls certain specified sums for the support of its charity. (Consol. Act, § 208.) The board of estimate and apportionment was also authorized to appropriate all excise moneys to certain benevolent and charitable institutions. (Consol. Act, § 210.) Thus the Legislature has imposed upon the municipality the burden of refunding to licensees, whose licenses have been abridged, moneys which it originally received and held for charitable purposes; and this, too, whether or not these moneys had already been applied to such purposes. Thus it is apparent that the complaint nowhere alleges a breach of contract, express or implied, "to pay money received * * * by the defendant." The latter phrase undoubtedly means to pay money received by the defendant for the plaintiff, or to which the plaintiff, upon the receipt of such money by the defendant, was in justice entitled. It does not mean to repay to the plaintiff money received from him by the defendant for the defendant's own use, which, owing to circumstances subsequently occurring, the defendant is required to return. What the complaint here really alleges is a statutory obligation to restore to the plaintiff part of the money originally received by the defendant to its own use as statutory trustee for public charity; which part, in equity and justice, as decreed by the Legislature, should now be refunded to the plaintiff. That right of action does not depend at all upon the receipt of the license fee by the defendant. The statute gives it whether the board of excise did its duty or not; whether that board paid the fee into the city treasury or not; whether, if it did, the city has

applied the fee to the specified charities or not. The right of action depends solely upon the two facts, *first*, the payment of the license fee to the board; and, *second*, the statutory termination of the license. (Laws of 1896, chap. 112, §4.)

Our conclusion is that this right of action is not upon a contract express or implied, within the meaning of that phrase as used in section 420 of the Code; that it is not, in fact, upon a contract at all, but upon the fiction of a promise implied by law from statutory compulsion; and that it certainly is not upon an implied contract to pay money received by the defendant.

It follows that the nature of the plaintiff's action was such that he could not take judgment without application to the court.

The order appealed from should, therefore, be reversed, with ten dollars costs and disbursements, and the motion for judgment granted, without costs.

RUMSEY, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

Fourth Appellate Department, February, 1897. Reported. 14 App. Div. 628.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN SWEENEY,
Appellant v. JOHN C. LAMMERTS, as County Treasurer of the
County of Niagara, Respondent.

Order affirmed, with disbursements.

All concurred, except FOLLETT, J., not sitting.

Third Appellate Department, March, 1897. Reported. 15 App. Div. 290.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. GEORGE M.
THOMAS, Respondent, v. MARTIN R. SACKETT, as Treasurer of
the County of St. Lawrence, Appellant.

Liquor Tax Law—Decision whether liquor shall be sold—It must be made
at the annual town meeting—Appeal from an order directing a tax
certificate to issue—Restitution.

The provisions of section 16 of chapter 112 of the Laws of 1896, known as the Liquor Tax Law, providing for the submission to the electors of a town of the question whether any liquors shall be sold there, contemplate that action upon that proposition shall be taken at an annual town meeting.

An order reversing the decision of a county treasurer, in refusing to issue a liquor tax certificate, affects a substantial right, and is appealable under section 1356 of the Code of Civil Procedure, and the county treasurer, although not affected pecuniarily, is a party aggrieved, within the meaning of section 1294 of the Code of Civil Procedure.

The court has power, under section 1323 of the Code of Civil Procedure, to restore to a person, who has paid for a license in reliance upon an order subsequently reversed upon appeal, a *pro rata* amount of the tax paid by him.

APPEAL by the defendant, Martin R. Sackett, as treasurer of the county of St. Lawrence, from an order of the Supreme Court, made at the St. Lawrence Special Term and entered in the office of the clerk of the county of St. Lawrence on the 17th day of June, 1896, reversing the decision of the county treasurer of St. Lawrence county, refusing to issue a tax certificate to the relator, and directing that such certificate issue.

The order was made in a proceeding upon certiorari under section 28 of chapter 112 of the Laws of 1896, commonly known as the Liquor Tax Law.

Jedyard P. Hale, for the Appellant.

John C. Keeler, for the Respondent.

PARKER, P. J. The relator in this matter applied to the treasurer of St. Lawrence county for the certificate authorized by section 19 of chapter 112 of the Laws of 1896, commonly known as the Liquor Tax Law. He was a resident of the town of Edwards, in that county, and fully complied with all the requirements of such section. The treasurer, however, refused to issue to him a certificate, upon the ground that, at the time the above cited act took effect, there was no license in the town of Edwards, and that no vote of such town had been since lawfully taken authorizing the sale of liquor in such town. The relator there upon procured, under the provisions of section 28 of that law a writ of certiorari, returnable before a justice of this court, and upon the hearing thereof, an order was made directing the county treasurer to issue a certificate to the relator, upon his paying the tax required by section 11 of such act. From such order an appeal is brought to this court.

It is conceded that at the time the above act became a law, there was no license in the town of Edwards. Also, that a town

meeting was held on April 25, 1896, in such town, and the questions allowed by section 16 of such act were then submitted to the voters of the town, and that a majority of the votes then given were in favor of the sale of liquor in such town.

The treasurer, however, contends that, inasmuch as such meeting was a special town meeting, called merely for the purpose of submitting such questions to it, it was not such a meeting as is contemplated by section 16, and that, therefore, the vote taken thereat was without force or effect.

The first question presented is whether such meeting was, or was not, a special town meeting, called for that purpose only. It is claimed by the respondent that, from the record before us, we cannot assume that it was not the annual town meeting then held in such town.

It is true that, under the law as it now exists (§ 10 of the Town Law, chap. 569, Laws of 1890, as amended by chap. 82, Laws of 1893), the meeting for the annual election of town officers may have been held in the town of Edwards on the 25th of April, 1896, and that the averment in the petition is substantially to that effect. But the return of the treasurer substantially denies that averment by stating that the certificate was refused because the meeting in question was a "special town meeting" and, therefore, without jurisdiction. And upon a certiorari the court is to be controlled by the statement of facts contained in the return to the writ. (*People ex rel. Peck v. Comrs., etc., of Brooklyn*, 106 N. Y. 64, 67.)

It also appears very clearly that the only question raised upon the hearing below was as to the jurisdiction of such meeting, and no such question could have arisen unless it had been assumed that it was a special and not an annual one. Upon this appeal, therefore, we must assume and decide the question presented on the theory that the meeting of April twenty-fifth was a special meeting called for a special purpose.

An analysis of section 16, above referred to, shows that it provides for submitting to the electors of the town the question, whether any liquors shall be sold therein, in the following manner: *First*. It designates the officer who is to prepare the ballots for that purpose, to wit, the officer of the town charged by the Election Law with the duty of preparing official ballots. Section 86 of that law (Chap. 680, Laws of 1892, as amended by chap. 810, Laws of 1895) requires the town clerk to prepare

such ballots for any town meeting for the election of town officers held upon a different day from a general election. There does not seem to be any provision in that law, or in any other, requiring any officer to provide *official* ballots for any town meeting, except one for the election of public officers.

Next, it provides the time when he shall have such ballots prepared, viz.: "At the time fixed by law for preparing the ballots for a town election occurring next after the passage of this act."

Section 12 of the Town Law provides for the election of town officers at the annual town meeting.

Section 25 of that law provides for "special town meetings," at which certain *propositions*, therein specified, may be voted upon. Such meetings are held whenever called for by certain officers, or taxpayers, therein specified, and no election of officers can be had at any such meeting. It is also further provided by section 34 of the Town Law that no proposition then presented shall be voted upon by ballot, unless a particular request and notice, then provided for, is made and given, and in that case the town clerk is to provide ballots therefor, either written or printed, and evidently not as *official* ballots. No special form is required for them, and evidently nothing prevents the elector from using his own instead of voting them.

Now, what does section 16 mean by the phrase "at the time fixed by law for preparing the ballots for a town election," etc.? Evidently not upon any day that a special town meeting shall be called and held, for there is no time fixed by law for providing official ballots for such a meeting, nor any provision of law for using them at such a meeting. Such a meeting is not in any sense a "town election." No officer can be elected at such a meeting, and, in many instances, no ballots need be used thereat. The phrase "town election," therefore, can only refer to the annual town meeting at which officers are elected. For such a meeting the town clerk is required by section 86 of the Election Law to prepare official ballots, and to have them ready and open to public inspection one day before the election is held. And that election day is fixed by law, and must occur on the same day in each year, without any notice being given thereof. (Town Law, §§10, 26.)

It seems, therefore, that, under section 16, the meeting therein referred to is the one at which a town election for officers may be held; one at which official ballots are required to be used, and for which it is made the duty of the town clerk to prepare such

ballots at a fixed and stated time. The annual town meeting is the only one to which these provisions are applicable. And when that section requires the town clerk to have prepared the ballots therein specified, at the time fixed by law for preparing the ballots for a town election occurring next after the passage of that act, it requires him to prepare them at the same time that he does the ballots for the next annual town meeting. Thus the intent of the statute appears to submit the question at the next annual town meeting, and is in harmony with the subsequent provision, that the same questions shall be submitted at the *annual* town election in every second year thereafter, if a sufficient number of the electors petition therefor.

Moreover, the statute evidently intends to preserve intact the condition in which it finds each town at the time the law takes effect. Section 16, above cited, provides that in towns where no license exists at the time the act becomes a law, no liquor tax certificate shall be issued until the electors of the town shall have changed that condition by taking a vote as provided in that section. That is, the existing condition shall not be changed by the mere change from the old to the new excise law. So, also, the method for effecting the change, as provided by section 16, is so arranged that the existing condition may not be changed any sooner than it could have been had the new law never been passed. That is, it can be changed at the next annual town meeting, but no sooner. The new law undoubtedly intends to provide a more definite and precise method for expressing the will of the electors upon that subject, but it is careful not to interfere at all with the existing conditions in the several towns of the State at the time it takes effect. And I do not see any reason why a different intent should be expected or sought for. It was evidently just not to force upon a town that had secured, at the last annual meeting, exemption from the sale of liquor therein for a year, a law that would operate to change that condition, or that would force them to another vote to determine what they had so recently settled.

The fact that a better method of expressing the popular will on that question was to be thereafter adopted does not indicate an intent to force, by its immediate use, an immediate change in a condition which had, in most instances, been recently and fairly adopted.

I conclude that it was the intent of the Legislature that the vote upon the propositions allowed by section 16, above cited,

should be had at an annual town meeting, and that, therefore, the action of the meeting held on April 25, 1896, was inoperative and the treasurer was correct in not recognizing the same.

It is claimed by the respondent that no appeal lies from the order made at Special Term in this matter. The writ of certiorari is a special proceeding (Code, tit. 2, chap. 16), and the order from which this appeal is taken affects a substantial right therein. It is, therefore, appealable under section 1356 of the Code. The county treasurer, by that order, is directed to do an act which, as a public officer, he is not authorized to do, and, although it does not affect him *pecuniarily*, he has such an interest in the subject as to make him a party aggrieved within the meaning of section 1294 of the Code. (*People ex rel. Burnham v. Jones*, 110 N. Y. 509; *People ex rel. French v. Town*, 1 App. Div. 127.)

It does not appear from the record whether or not the tax has been paid and a certificate issued, but we understand it to be conceded upon the argument that such is the case. Under such circumstances, justice requires that restitution of the amount should be made. The relator paid the tax relying upon the order which we now reverse, and we are of the opinion that the case, therefore, comes within the provisions of section 1323 of the Code. Under that section this court has power to order restitution. We, therefore, conclude that an order should be entered reversing the order appealed from, with costs in the court below, and revoking and canceling the tax certificate issued, and awarding restitution to the relator of a *pro rata* amount of the tax paid by him therefor, with ten dollars costs and disbursements to the appellant of this appeal.

All concurred.

Order reversed, with costs in court below, and tax certificate canceled, and restitution of a ratable amount of the tax paid ordered, with ten dollars costs and disbursements of this appeal.

**Court of General Sessions, New York County, March, 1897. Reported
19 Misc. 665.**

THE PEOPLE v. CONSTANT BOUDOUIN.

Liquor Tax Law—Violations of—Jurisdiction.

The grand jury and courts of New York county have jurisdiction of violations of the Liquor Tax Law committed in the territory annexed to New York city by chapter 934, Laws of 1895.

DEMURRER to indictment.

John D. Lindsay, assistant district attorney, for the People.

David H. Hunt, for defendant.

McMAHON, J. The defendant is charged with violation of the Liquor Tax Law, chapter 112, Laws of 1896.

It is alleged in the indictment that the offense was committed in that portion of the city of New York which was annexed to the county of New York by chapter 934 of the Laws of 1895.

A demurrer has been submitted in his behalf on the ground that the grand jury of New York county had no legal authority to inquire into the crime charged, by reason of its not being within the legal jurisdiction of the county.

The territory in which the offense is alleged to have been committed was "set off from the county of Westchester and annexed to, merged in and made part of the city and county of New York," by the provisions of chapter 934 of the Laws of 1895.

To sustain the demurrer the defendant relies upon the following provision of the Liquor Tax Law, which took effect March 23, 1896, and especially relates to the territory in which the offense is laid:

"If, since the latest State enumeration was taken, the boundaries of a city have been changed by the addition of territory not in the same judicial district, such annexed territory shall not be deemed to be a part of such city for the purposes of this act. but such annexed territory shall be deemed to be a town, and all the provisions of this act shall be applicable to such annexed territory the same as if it had not been so annexed, except that all the money which would otherwise be payable to the town

under this act shall be paid to the city to which such territory was annexed." Liquor Tax Law, subd. 4, § 11.

There has been no State enumeration since the passage of this act.

The act of 1895, cited by the learned district attorney, made the annexed district part of the city *and county* of New York, and it so remains. The act of 1896 declares that "for the purposes of this act" this territory shall not be deemed a part of the *city* of New York. What are the purposes of this act? Clearly, to impose a tax upon the liquor traffic within the State and to regulate the collection of the same. It surely was no part of the purpose of this act to change the mode of procedure for the prosecution and punishment of crime. On the contrary, as far as it touches upon that subject, it re-enacts (section 35) the sections of the Code of Criminal Procedure, and prescribes that "All proceedings instituted for the punishment of any violation of the provisions of this act, the penalties for which are prescribed in section thirty-four, shall be prosecuted by indictment by the grand jury of the county in which the crime was committed, and by trial in a court of record having jurisdiction for the trial of crimes of the grade of a felony." Other sections of the same act impose obligations or confer privileges in towns and villages not imposed or permitted in cities. For instance, a light tax-rate and local option are allowed to towns but denied to cities. The distance from schools, churches and public institutions, within which the traffic is permitted in cities and towns, also varies in the act, and it is, no doubt, for these reasons that, with the exception stated in the provision quoted above relating to the payment of money collected, all the provisions of the act were made applicable to such annexed territory the same as if it had not been annexed to the city of New York. The territory in question is sparsely populated, and to subject it to the rigid regulations and high tax prescribed for the first-class city of which it becomes a part would have been oppressive.

The legislature, within constitutional limitations, has the undoubted right, and has often exercised it, of segregating part of a county and attaching it to another, or of attaching part of a county to a city without changing the county lines, and the act of 1895, by its terms, sets off from the county of Westchester and merges in the city and county of New York, certain territory, while a subsequent enactment declares that for certain purposes

this territory is not to be deemed part of said city, but should, for the purposes indicated, remain the same as if it had not been so annexed. It is very clear from the text that the words "so annexed," as used in this section, mean the annexation to the city of New York, not the annexation to the county.

It follows that for all purposes other than those indicated in the Liquor Tax Law, the territory in question is part of the county of New York, and subject to the jurisdiction of the grand jury and courts of that county in all matters pertaining to the prosecution and punishment of crime.

The demurrer is disallowed.

Ordered accordingly.

Supreme Court, Ulster Special Term, April, 1897. Reported. 20 Misc. 80.

THE PEOPLE ex rel. WILLIAM H. D. SWEET v. HENRY H. LYMAN,
State Commissioner of Excise.

1. Civil service—Appointment.

The provision of chapter 354, Laws of 1883, providing for probationary appointments, must be read with chapter 821, Laws of 1896, and is intended as a means, in connection with the examination of the civil service board, of ascertaining the applicant's qualifications and fitness in advance of an appointment.

2. Veterans—Probationary appointment—Removal.

A veteran who has received a probationary appointment is not "holding a position" within the meaning of these words in chapter 821, Laws of 1896, and is not entitled to notice and hearing upon charges before removal.

MOTION for a peremptory mandamus commanding the defendant to reinstate the relator as special agent in the excise department of the State of New York.

Eugene D. Flanigan, for relator.

G. D. B. Hasbrouck, Deputy Attorney-General, for defendant.

CHASE, J. The relator is a citizen and resident of the State of New York and was a soldier in the Union army during the War of the Rebellion, and was honorably discharged therefrom.

He never served in the Confederate army or navy. In the month of June, 1896, he presented himself before the civil service board of examiners of the State of New York to be examined for the position of special agent, created under and by virtue of chapter 112 of the Laws of 1896, known as the "Liquor Tax Law," and did at such time take the examination submitted by the said board to him for such position.

At the time of such examination he presented to and filed with said board his certificate of honorable discharge as such Union soldier and claimed the benefits and preferences arising thereunder.

He successfully passed said examination and his name was placed upon the register of applicants eligible for appointment, and his name was certified to the commissioner of excise as an honorably discharged Union soldier eligible to appointment as special agent.

On the 28th day of September, 1896, the relator received a letter from the commissioner of excise, dated September 25th, which letter is as follows: "This is to inform you that, under the provisions of the civil service rules, I have selected you for appointment to the position of special agent in this department for a probationary term of three months, from the date when you begin service. Should your conduct and efficiency during such probationary term prove satisfactory you will, at its close, receive a regular appointment, otherwise your employment will cease. The salary attached to such position is at the rate of \$1,200 per annum.

"This conditional appointment does not preclude prompt discharge from service at any time during such probationary term, in case of misconduct or inefficiency.

"A prompt reply is requested, stating whether this appointment is accepted, and giving the earliest date when you can present yourself for service."

He accepted such appointment and on the same day presented himself for service, and was assigned and detailed for duty at Ogdensburg, N. Y., his appointment dating from September 25, 1896.

On or about the 20th day of December, 1896, he received a letter from the commissioner of excise, dated December 19, 1896, which letter is as follows:

"I have to inform you that your efficiency and capacity for the

work required of a special agent, during your employment in this department, for a probationary term of three months, have not been found satisfactory and that in accordance with the terms of your original appointment, as prescribed in the civil service rule No. 36, your employment by this department will cease on the 23d day of December, 1896."

He has not been connected with the excise department since said 23d day of December, 1896.

The relator claims that, pursuant to chapter 821, Laws of 1896, he was holding a position by appointment or employment and he should have been given a hearing upon due notice upon the charges made before removal, and that his removal without formal charges, notice and hearing was unlawful.

Section 2, chapter 354, Laws of 1883, provides:

"§ 2. It shall be the duty of said commission: First. To aid the governor, as he may request, in preparing suitable rules for carrying this act into effect; and when said rules shall have been promulgated, it shall be the duty of all officers of the State of New York, in the departments and offices to which any such rules may relate, to aid, in all proper ways, in carrying said rules, and any modification thereof, into effect.

"Second. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows: * * * 3. There shall be a period of probation before any absolute appointment or employment aforesaid. * * * 8. Notice shall be given in writing by the appointing power to said commission * * * of the rejection of any such persons after probation * * *."

Among the rules promulgated in accordance with the statutes in force when relator accepted the appointment on September 25, 1896, was rule 36, which is as follows: "Every original appointment or employment in the civil service shall be for a probationary term of three months, at the end of which time, if the conduct and capacity of the person appointed or employed shall have been found satisfactory, the probationer shall be absolutely appointed or employed, but otherwise his appointment shall cease."

Among the rules promulgated December 9, 1896, is rule 12, which is as follows: "1. Every original appointment to or employment in any position in class II shall be for a probationary term of three months, and an appointing or nominating officer in notifying a person selected by him for appointment or employment

shall specify the same as for a probationary term only; and at the end of such term if the conduct, capacity and fitness of the probationer are satisfactory to the appointing officer, his retention in the service shall be equivalent to his absolute appointment, but if his conduct, capacity or fitness be not satisfactory, he may be discharged at any time."

Chapter 821, Laws 1896, provides as follows:

"§ 1. In every public department and upon all public works of the State of New York, and of the cities, counties, towns and villages thereof * * * honorably-discharged Union soldiers, sailors and marines shall be preferred for appointment, employment and promotion; age, loss of limb, or other physical impairment which does not, in fact, incapacitate, shall not be deemed to disqualify them, provided they possess the business capacity necessary to discharge the duties of the position involved. And no person holding a position by appointment or employment in the State of New York * * * who is an honorably-discharged soldier, sailor or marine, having served as such in the Union army or navy during the war of the Rebellion, and who shall not have served in the Confederate army or navy, shall be removed from such position or employment except for incompetency or misconduct shown, after a hearing upon due notice * * *."

The statute of 1896 gives honorably-discharged soldiers, sailors and marines a preference for appointment, employment and promotion in every public department and upon all public works of the State, and in the cities, counties, towns and villages of the State. The Legislature also intended by this statute to give to soldiers, sailors and marines after appointment security of tenure in their positions, and it also intended to remove them from all political, partisan or personal influence. A soldier, sailor, or marine *holding a position* mentioned in the act of 1896, has, so long as the service is required, an absolute legal right to continue in the place to which he is appointed indefinitely unless removed "for incompetency or misconduct shown, after a hearing upon due notice upon the charge made." It is not, however, intended by this act to exclude from consideration the question of capacity and fitness. The act in effect provides that a person applying for an appointment or for employment, although a soldier, sailor or marine, who has passed the formal examination, shall possess the business capacity necessary to discharge the

duties of the position involved. It is essential that there be some way devised by general rules, or by the appointing power, to determine as to each applicant's business capacity. One of the ways devised for determining whether the applicant, including soldiers, sailors and marines, possesses the business capacity necessary to discharge the duties of the position involved, is to give a probationary appointment as provided and directed by the act of 1883 and the rules promulgated pursuant to that act.

The provision of the act of 1883 in regard to a probationary appointment must be read with the act of 1896, and is intended as a means, in connection with the examination of the civil service board, of ascertaining the applicant's qualifications and fitness in advance of an appointment. See *People ex rel. Van Petten v. Cobb*, 13 App. Div. 56.

According to the commissioner of excise the relator was examined to ascertain whether he had the *necessary business capacity* to fill the position of special agent under the "Liquor Tax Law." The examination was made by giving him a three months' trial, and as his efficiency and capacity were not satisfactory, he was not appointed.

I do not mean to hold that there is no way to review the action of the commissioner of excise, but I am of the opinion that relator was not entitled to notice and hearing upon charges made by the commissioner of excise, as provided by chapter 821 of the Laws of 1896, for the reason that on the 23d day of December, 1896, he was not *holding a position* within the meaning of those words in that act.

The motion is denied.

Motion denied.

County Court, Onondaga County, April, 1897. Reported. 20 Misc. 149.

THE PEOPLE ex rel. JOHN SHORTELL v. JOHN D. MARKELL.

Criminal law—Public intoxication—Liquor Tax Law.

The offense of intoxication in a public place, in violation of section 40 of the Liquor Tax Law (Laws 1896, chap. 112), is a misdemeanor, of which a Court of Special Sessions has jurisdiction.

RETURN of a *habeas corpus* to inquire as to the cause of the detention of the relator.

The relator was, on the 21st of December, 1896, tried in the Police Court of the city of Syracuse, charged with being a disorderly person, having been intoxicated in a public place or street, to wit, Water street in said city of Syracuse, in violation of section 40, chapter 112 of the Excise Law of 1896, and having pleaded guilty was convicted and adjudged that he be imprisoned in the Onondaga County Penitentiary for six months. A return was made by the defendant, the superintendent of the Onondaga County Penitentiary, stating the above facts.

M. L. McCarthy, for the relator.

George W. Standen, Assistant District Attorney, for defendant.

Ross, J. It is claimed by the relator that the conviction by the Court of Special Sessions was unauthorized and that no jurisdiction is given to said court by the provisions of the act in question. Section 40 reads as follows: "Intoxication in a public place. Any person intoxicated in a public place is a disorderly person and may be arrested without warrant while so intoxicated, and shall be punished by a fine of not less than three nor more than ten dollars, or by imprisonment not exceeding six months or by both such fine and imprisonment. The purchase or procurement of liquor for any person to whom it is forbidden to sell liquor under section 30 of this act, is a misdemeanor, punishable upon conviction, by a fine of not less than ten dollars or by imprisonment not exceeding six months, or by both such fine and imprisonment."

It has recently been held in the Sixth Judicial District in the case of *People ex rel. McCarthy v. Webster* (unreported and no

opinion), by Mr. Justice Walter Lloyd Smith, that a person charged with public intoxication under section 40 is a disorderly person subject to summary care by a magistrate pursuant to the provisions of part 6, title 7, of the Code of Criminal Procedure, sections 899 to 913, inclusive, and that a conviction of a Court of Special Sessions and a commitment to a penitentiary is unauthorized. A decision of that learned justice is entitled to great weight but the decision referred to was rendered while the justice was engaged at Circuit and disposed of as usually those proceedings are, hastily, and without an opportunity for careful examination. The use of the words "disorderly person" in the first clause of section 40, and the omission of the words specifically declaring the offense in question to be a misdemeanor, coupled with the declaration that a violation of the acts forbidden in the second sentence of the section are misdemeanors, would lend much force to the position taken by the learned justice. But see opinion of Mr. Justice Pratt in *Behan v. People*, 17 N. Y. 516, hereafter inserted. Also section 42 of the act in question specifically provides that a violation of any provision of the act for which no punishment is otherwise provided is a misdemeanor.

The provisions of title 7, above mentioned, in brief defined nine classes of persons who are termed disorderly persons. The first and second subdivisions relate to persons who neglect to provide for their families. The other persons classified are fortune tellers, jugglers, habitual criminals and so forth, and upon a conviction by a magistrate provision is made that the defendant may give security in those cases where he is charged with neglect to support his family that they will not become a charge, for one year, upon the public; and in the other cases for his good behavior during the space of one year.

The Legislature may add new offenses of the same grade or class as those previously constituting a disorderly person, but they can not by declaring an offense which at common law is indictable to be punished summarily in the provisions relating to disorderly persons. 1 Colby's Criminal Law, 138.

But assuming that such authority exists and that the Legislature had the right to deprive in this manner a person charged with intoxication in a public place of the right to trial by a jury, such a radical change in the method of disposing of this class of offenses can not be inferred and such intent must be manifest.

The attempt to incorporate the provisions of the first sentence of section 40 of chapter 112, Laws of 1896, in or to add the same to title 7, Code Criminal Procedure, is most incongruous and unsatisfactory. The provisions of section 40 authorize an arrest without warrant, while the provisions of section 900 require both a warrant and complaint. The persons classed as disorderly persons are all cases of threatened rather than consummated misconduct, as was said in the case of *Hill v. People*, 20 N. Y. 368: "In those cases, persons are charged with habitual misconduct, and not with a specific offense." And a provision creating an additional class of disorderly persons without making any change from the former method of punishment is useless. If a person convicted of being intoxicated in a public place can be arrested without a complaint and without a warrant as heretofore, and punished in the same manner as before, to simply term him a disorderly person has no meaning.

Again the silence of the statute as to any method of procedure relating to this class of persons, would seem to be very strong evidence that it was not intended. If it was intended to remove these offenders from a classification with those who are charged with the actual commission of crime and treat public intoxication, not as a crime consummated, but as an act to be prevented, which is contrary to the actual fact, the entire details of such a change would not be left to inference. But beyond all, such an interpretation is contrary to all preceding legislation existing in this State for nearly a century. And in arriving at a question of legislative intent, the previous legislation upon the same subject is not only important, but a change of so radical a nature as that perhaps can not be presumed, as was said by Mr. Judge Pratt in the Behan case: "It has been the policy of the State, at least since the year 1801, if not before, to make offenses against the excise laws punishable by indictment * * *. The presumption, therefore, is against the design on the part of the Legislature, in the restoration of the license laws, to change a policy so long adhered to. It should require a clear expression of the legislative will to that effect to justify the courts in holding that offenses against those laws are no longer indictable." *Hill v. People*, 20 N. Y. 363. It would require a great deal of hardihood to judicially determine that after an almost uniform course of legislation in this State for nearly a century declaring that public intoxication is a crime and providing for its punishment, that the Legislature of

1896 intended to omit or did omit any provision for the punishment of this crime, this most common of all crimes. Such an interpretation would leave the public unprotected in this regard, not only by its omission from the act in question, which was designed as a uniform and complete act upon the subject to which it relates, but by the language of section 44 repeals all special or local laws in conflict with its provisions, which would at least render it doubtful whether the provisions of the various city charters in relation to this subject would afford any protection and in those localities unaffected by local or special laws there would be no protection whatever.

The offense in question is not only not termed a misdemeanor, but the offender is called a "disorderly person" and the punishment is prescribed. If no punishment were fixed it would seem to be included in the provisions of section 42, which provides that any wilful violation of a provision of this act for which no punishment or penalty is prescribed shall be a misdemeanor. Mr. Judge Folger, in the case of *Foote v. People*, 56 N. Y. 330 and 331, said of the act of 1857: "We find the statute throughout declaring certain acts to be offenses; often giving to them no place in the gradation of crime and affixing to them no punishment usually inflicted upon a criminal offender; and again, ranking others of them as misdemeanors and specifying the punishment, or specifying the punishment with no nomination of the grade of the offense."

Take section 13 of the act of 1857 as an illustration of the class last named by the learned judge: "Whoever shall sell any strong or spirituous liquors or wines in quantities less than five gallons at a time, without having a license therefor, granted as herein provided, shall forfeit fifty dollars for each offense." A violation of this section was held to be a misdemeanor in the Behan case, in which Mr. Judge Pratt, on page 520, used the following language: "The only reasons worthy of consideration which have been suggested, in opposition to the views expressed above, are based upon the fact that the act itself declares some three or four of the violations of its provisions misdemeanors. It is insisted that the maxim, '*expressio unius est exclusio alterius*,' in its legal application to this statute, would exclude the assumption that any other offenses were designed to be deemed misdemeanors. In a statute which appears to have been carefully drawn up, and all its provisions carefully considered, I should

be inclined to give great force to that maxim; but the statute under consideration appears upon its face to have been very carelessly framed, and to have been adopted without a very careful consideration of its provisions. In such case, it would not be safe to give that maxim much force. It would be much safer to look at the general scope and purpose of the act, and to search there for an expression of the legislative intention; and in looking over all the provisions of the act, in their general scope and tenor, I cannot resist the conviction that offenses against its provisions were designed to be punishable as misdemeanors."

I think the Behan case is in point. The cases are similar in that there is no nomination of the crime unless the words "disorderly person" is such a nomination. Also, in the fact that the punishment is specified. The words "disorderly person" are, I believe, merely descriptive, as was said by Mr. Judge Strong, in *Hill v. People*, 20 N. Y. 368: "Persons who are found intoxicated in public places may well be considered as disorderly at the time; so may persons when perpetrating almost any crime, but when publicly arraigned for the offense they cannot be summarily tried by the magistrate alone, under the act relative to disorderly persons." And I think the words in question are to be interpreted the same as if the words "is a criminal" were inserted.

The act is forbidden and punishment is prescribed. Section 3 of the Penal Code defines a crime: "A crime is an act or omission forbidden by law and punishable upon conviction by

"1. Death.

"2. Imprisonment.

"3. Fine." * * *

Section 4 provides that a crime is either,

"1. A felony, or

"2. A misdemeanor."

Section 5. "A felony is a crime which is or may be punishable by either,

"1. Death, or

"2. Imprisonment in a State prison."

Section 6. "Any other crime is a misdemeanor." It would, therefore, seem that if this act is forbidden by law, that by the process of elimination it is necessarily a misdemeanor.

It was held in the case of *The People ex rel. Kopp v. French*, 102 N. Y. 583, that the offense of intoxication created by the

Excise Law of 1857 (Chap. 628, § 17) is a crime. If the charge of public intoxication is a misdemeanor, the police justice sitting as a police court had jurisdiction and a conviction was authorized. State Const., art. 6, § 23; Code Crim. Pro. §§56 and 74; Penal Code, § 725, subd. 3; charter of the City of Syracuse, §§ 52, 53.

The writ dismissed and relator remanded.

As the term of imprisonment of the relator will expire before he can have this decision reviewed by the Appellate Division, a stay is granted upon the relator's giving an undertaking in the sum of \$300. But if an appeal is not taken within three days from the entry of an order hereon, or the relator does not serve his case upon the district attorney within twenty days thereafter, or does not argue or submit the appeal at the June term of the Appellate Division, then upon his default in any of these particulars, the stay herein will be vacated without notice.

Ordered accordingly.

First Appellate Department, April, 1897. Reported. 16 App. Div. 379.

In the Matter of the Application of GREGOR MOSER for a Writ of Certiorari, Respondent, v. KARL SCHEIB, Appellant, Impleaded with Others.

Proceedings to annul a liquor tax certificate—An order returnable after ten days is void.

An order issued in a proceeding taken to annul a liquor tax certificate, made returnable fifteen days, instead of not more than ten as required by the statute, after the granting thereof, will be reversed.

APPEAL by Karl Scheib from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York, on the 2d day of January, 1897, revoking a liquor tax certificate issued to Karl Scheib, a writ of certiorari to review the action of the special deputy excise commissioner in granting such liquor tax certificate to said Scheib having been granted upon the ground that he was not a citizen of the United States.

Thomas P. Mulligan, for the appellant.

Leopold W. Harburger, for the respondent.

PER CURIAM. The court was without jurisdiction to make the order appealed from.

In a proceeding taken to annul a liquor tax certificate, the statute provides for the granting of "an order requiring the holder of such certificate * * * to appear * * * on a day specified therein, not more than ten days after the granting thereof." (Laws of 1896, chap. 112, § 28.)

The order issued in this proceeding was made returnable fifteen days after the granting thereof.

The order should be reversed, with ten dollars costs and printing disbursements.

Present — VAN BRUNT, P. J., RUMSEY, WILLIAMS, PATTERSON and PARKER, JJ.

Order reversed, with ten dollars costs and disbursements.

Supreme Court, Columbia Special Term, April, 1897. Unreported.

In the Matter of the Application of HARDER to revoke the Liquor Tax Certificate of JAMES McNAMEE.

EDWARDS, J. This proceeding is brought for the revocation and cancellation of a liquor tax certificate upon the ground that the holder of such certificate did not procure the consent in writing of two-thirds of the owners of the buildings occupied exclusively for dwellings, situated within two hundred feet of the nearest entrance to the premises in which the traffic in liquor is carried on. There are two buildings occupied exclusively for dwellings, the nearest entrance to each of which is within two hundred feet to the nearest entrance of the defendant's saloon. Until the time when the application for a license was made, each of these two buildings had a single owner and the consent of both was then necessary to the procuring of a license. On the day on which the application for a license was made, the owner of one of these buildings conveyed an undivided interest in the same to his wife, and immediately thereupon he and his wife signed a consent in writing that traffic in liquors might be carried on in the defendant's premises. This conveyance of an undivided interest to the wife was evidently executed at the defendant's request, and

for the purpose of enabling him to procure the consent required by statute.

The question presented is whether the defendant has complied with the provisions of subdivision 8 of section 17 of chapter 112 of the Laws of 1896, which reads as follows: "When the nearest entrance to the premises described in said statement as those in which traffic in liquor is to be carried on is within two hundred feet of the nearest entrance to a building or buildings occupied exclusively for a dwelling, there shall also be so filed simultaneously with said statement a consent in writing that such traffic in liquors be so carried on in said premises during a term therein stated, executed by at least two-thirds of the owners of such buildings within two hundred feet so occupied as dwellings."

The determination of the question requires a judicial construction of the statute. In the interpretation of the statutes it is a settled and familiar rule that the intention of the Legislature should control. The legislative purpose in making a statute is the key to its proper construction. "It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter and the thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers." *Riggs v. Palmer*, 115 N. Y. 509.

The obvious purpose of the enactment requiring the consent of two-thirds of the owners of buildings the nearest entrance of which is within two hundred feet to the nearest entrance of the building in which the traffic in liquor is to be carried on, is to protect the owners of dwellings and the families occupying the same, against the annoyances and baneful influences of the saloon. To effectuate this purpose it is evident that each building should be considered as a unit irrespective of the number of owners. If, in determining whether two-thirds of the owners have signed the consent, each owner of any undivided interest however small, in any one building, is to be counted, the beneficent purpose of the statute could almost invariably be defeated. If, within the prohibited distance of two hundred feet of the proposed saloon there are several buildings occupied by families exclusively for dwellings, all of the owners of which but one are opposed to the presence of the saloon, such opposition might easily be thwarted by a conveyance by the owner of the one building, of several minute interests therein to a sufficient

number of persons to constitute the two-thirds, required by statute. It is quite clear that the statute must be so construed as to require the consent of the owner or owners of at least two-thirds of the total number of buildings occupied as dwellings within the two hundred feet. Only such an interpretation of the statute can effectuate the intention of the legislature.

A recent amendment of this section requires that the consent in writing be "executed by the owner or owners or by the duly authorized agent or agents of such owner or owners of at least two-thirds of the total number of such buildings within two hundred feet so occupied as dwellings." The manifest purpose of this change in the phraseology of the statute was to make the statute more clear and explicit. It is not a change of the legislative intent or the substance of the former statute but it is rather a legislative construction of the statute as it existed when the defendant's application for a certificate was made.

The prayer of the petitioner should be granted with costs, to be fixed on the settlement of the order at my chambers on the 29th day of April, at 3 o'clock in the afternoon.

Supreme Court, Ontario Special Term, April, 1897. Unreported.

In the Matter of the Application of MENZO W. JOHNSTON to Revoke a Liquor Tax Certificate of JOHN H. FOGARTY, et al.

Royal R. Scott, attorney for petitioner.

Hon. John F. Kinney, attorney for respondents.

WERNER, J. This is a proceeding under section 28 of chap. 112 of the Laws of 1896, commonly known as the "Liquor Tax Law" to obtain an order revoking a liquor tax certificate issued on the 11th day of August, 1896, by George N. Parmele, County Treasurer of Ontario county, to John H. Fogarty and John L. Ryan, comprising the firm of Fogarty & Ryan, in the village of Victor, in said county.

Two of the specific grounds enumerated in the statute as sufficient reasons for the revocation of said certificate are definitely set forth in the petition herein in substance as follows:

That there is, upon the same street upon which is located the building occupied by the respondents for traffic in liquors and within two hundred feet of the same, a building which is used and occupied exclusively as a church; and that the respondents did not file, simultaneously with their statement or application for said certificate, the consent in writing of at least two-thirds of the owners of buildings occupied exclusively as dwellings located within two hundred feet of the nearest entrance to the place in which such traffic in liquors was to be carried on.

A third ground now relied upon, and as to which evidence was adduced before the referee, but the facts in relation to which are not set forth in the petition, is that prior to the application for said certificate, John H. Fogarty, one of the respondents, was convicted of being a common gambler under section 344 of the Penal Code.

Subdivision 1 of section 23 of said "Liquor Tax Law" provides that "No person who shall have been or shall be convicted of felony" shall traffic in liquors. Among other statements contained in respondents' application for said certificate is the following:

"10. May the applicant or applicants lawfully carry on such traffic on said premises under said subdivision? Yes."

The fact of Fogarty's conviction is clearly established and the answer to the tenth interrogatory of said statement was manifestly untrue. But section 28 of said Act by which applications for revocation of certificates are authorized to be made, provides that the petition upon which the proceeding for revocation is based, shall state the facts which entitle the petitioner to the relief prayed for. There is no reference in the petition herein to the said conviction of Fogarty and this omission precludes the court from considering that as one of the grounds upon which the certificate issued to the respondents may be revoked.

It is clearly established that there is a building occupied exclusively as a church upon the same street with the building occupied by the respondents for their business of trafficking in liquor, and within two hundred feet thereof, measuring from the nearest entrance of respondents' building to the nearest entrance to said church. The distance between these two points is shown by actual measurement to be one hundred and ninety-two feet. The respondents claim exemption from the prohibition of the statute against traffic in liquors within two hundred feet of a church or

school house by virtue of the provision that said "prohibition shall not apply to a place which is occupied for a hotel nor to a place in which such traffic in liquors is actually lawfully carried on when this act takes effect."

The act became a law on the 23rd of March, 1896. The premises in which the respondents are carrying on their traffic in liquors under said certificate had been used as a hotel for fifteen or twenty years and had been leased to one of the respondents for that purpose about four years prior to the passage of said act. Fogarty had been in continuous possession thereof for that purpose up to the time respondents made application for said certificate; with the exception of the months of June and July, 1896, during which the hotel was temporarily closed. There is no dispute as to the fact that in March, 1896, the respondent Fogarty occupied the premises in question as a hotel. And this fairly brings the respondents within the protection of the proviso in subdivision 2 of section 24 of said act.

The contention of the petitioner's counsel that the answer of the respondents to the tenth question in the application cannot be true, if the answer to the fourth is correct, or vice versa, proceeds upon the narrow and extremely technical construction that the said fourth answer means that the applicants intended to carry on no other business upon said premises than that of trafficking in liquor. It seems to us that the application must be read as a whole. The fourth question and answer must be read and construed in connection with the third, which describes the property and the purposes for which it is designed to be used. Tested by this rule the answer to the fourth question cannot be said to have been false, any more than is the answer to the tenth so far as said answer is predicated upon the character of the business to be carried on in said premises.

The remaining question for consideration is whether the seventh interrogatory in said application was truthfully answered and whether the consents required by subdivision 8 of section 17 of said act were duly filed. Said interrogatory and answer are as follows:

"7. Is the nearest entrance to the described premises within two hundred feet of the nearest entrance to a building or buildings occupied exclusively for a dwelling, and if so how many owners are there of such building or buildings? Yes. Three (3) owners."

Said subdivision 8 of section 17 requires the filing simultaneously with the application of the consents of at least two-thirds of the owners of the buildings occupied exclusively as dwellings within said prescribed distance of two hundred feet.

The petitioner charges that this answer to the seventh interrogatory above quoted was false in two particulars. First, because there were more than three buildings within said prescribed distance of two hundred feet which were occupied exclusively as dwellings; and second that one of the buildings within said distance, the owner of which executed a consent, was not occupied exclusively as a dwelling and that in either event, the consents of the requisite two-thirds of such owners have not been executed and filed, as required by law. We have, in the discussion up to this point, given to the language of said act what we believe to be a fair and reasonable interpretation. The application of the same rule to the question whether the consents required by subdivision 8 of section 17 were filed, leads us to conclude that the provisions of the law in this behalf were not complied with.

The building marked "vacant" upon the map introduced in evidence is a two-story structure, the first floor of which is designed for and usually occupied as a store, and the upper floor of which is adapted for residence purposes.

The store was actually vacant at the time of the application by the respondents for their certificate; the upper floor was occupied by one Boltwood and his sons as a dwelling. The statute requires the filing of the consents of at least two-thirds of the owners of buildings occupied exclusively as dwellings, the nearest entrances to which are within two hundred feet of the nearest entrance to the premises described in the statement as those in which the traffic in liquor is to be carried on. The building is concededly within the prescribed distance of two hundred feet. The only question to be determined, therefore, is whether it is a building occupied exclusively for a dwelling within the meaning of the statute. In a strictly literal sense the said building was, at the time the act went into effect, occupied exclusively as a dwelling. But this language should not be given its narrowest and most technical interpretation. It should be read in the light of the spirit of the statute. The obvious purpose of this provision is to prohibit the sale of liquors within two hundred feet of dwelling houses unless the consents of at least two-thirds of the owners thereof

are obtained and filed. When this is done, the protest of the owner who does not consent is in vain. But when this is not done, the nonconsenting owner or any other citizen, may assail the validity of the certificate under which the traffic in liquors is carried on. This provision of the statute must, therefore, be held to refer not to the momentary use to which any building within said prescribed distance of two hundred feet may be put, but to its general use, adaptation and construction. A building containing a number of stores may, upon a given day, have a single occupant who uses a room for a dwelling; such occupancy would not, however, determine the character of the building in which his room is located. It would be a business building still and usually occupied as such. A building derives its character and designation from the usual and ordinary purposes for which it is used. This building occupied by Boltwood was designed for and usually used as a store and dwelling and was, therefore, not occupied exclusively as a dwelling.

Taking this building out of the category of dwellings within two hundred feet of the nearest entrance to the respondents' place of business and treating the signature of Jacobs as a nullity, it follows that if respondents' answer to the 7th interrogatory were true, that the consents required by the statute have not been filed, and that the respondents are not entitled to hold said certificate.

It is not contended that the sale of liquors was actually lawfully carried on in the premises of respondents at the time when said act took effect, and they are, therefore, not protected by the exception or proviso contained in said subdivision 8 in section 17. It will be observed that this exception is not as broad as that contained in subdivision 2 of section 24 with regard to churches and school houses. The latter applies to a place which was occupied as a hotel or in which the sale of liquor was actually lawfully carried on when the act took effect; the former only applies to places in which the sale of liquor was actually lawfully carried on when the act took effect.

The premises of Wilbur are concededly within the two hundred feet limit, and the only ground upon which his consent could be deemed unnecessary is that respondent had, without his, the consents of two-thirds of the owners required by the statute. As we have taken the position that the premises occupied by Boltwood were not occupied exclusively as a dwelling it would not

be necessary to further discuss the merits of this application, except for the possibility that our view of this question may be erroneous.

We will, therefore, consider the claim that there were other dwellings within said statutory limit, which were occupied exclusively as dwellings. The evidence discloses that to the northwest of respondents' premises and in an adjoining lot there are two dwelling houses owned by one Gallup, whose consent was not obtained. Measured by the most direct means of communication between said two dwellings and respondents' premises, the nearest entrances are within two hundred feet of each other, but, measured according to the route which would ordinarily be taken by persons going from the premises of one to the premises of the other, the distance would be more than two hundred feet. We have carefully considered this branch of the proceeding and were at first inclined to the view that the measurements should be made according to the route which would be taken by persons in the ordinary course of communication between two points but, upon reflection, we are constrained to hold that this rule would be so uncertain and impracticable as to nullify in many cases the purpose of the statute in this regard. The only certain satisfactory method by which measurements can be made is to proceed in a direct line between the two objective points. This may seem to be, in specific cases, a harsh and even an unreasonable rule, but it is the only one which is consonant with the spirit of the statute and under which an unvarying test can be applied. This view is sustained by decisions construing similar statutes. *Commonwealth v. Lyres* (142 Mass. 577) ; *State v. Greenway* (92 Iowa, 475) ; *State v. Ex. Comrs.* (56 N. J. 411.)

There is still another question which bears upon this feature of the case. Assuming that the true rule of measurement from nearest entrance to nearest entrance is along the usual or ordinarily used path, it is contended by the relator that there are entrances to the rear end and west side of respondents' hotel, which, according to any method of measurement, bring the nearest entrances to the Gallup dwellings within two hundred feet of the nearest entrances of respondents' hotel. If the doors in the rear end and on the west side of said hotel are now entrances within the meaning of the statute, then it must be conceded that this contention is sound. The evidence discloses that before the respondents made their application for the certificate herein, the

knobs were taken off of said door, and the doors were nailed up with ten penny nails, and have at all times remained so. We are inclined to the view that these doors are still entrances within the fair meaning of the statute. Any method of closing entrances which can by slight effort and without general observation, be changed, would throw upon the authorities charged with the enforcement of this law the duty of constant surveillance of each licensed place having such a "closed" entrance. This would be subversive of the letter as well as the spirit of the law. A loose construction of the statute in this regard would encourage every form of evasion and subterfuge which the ingenuity of unscrupulous men could devise.

In the matter of R. H. Macy to compel the granting of a storekeeper's license, it was held by the Appellate Division of the First Department, WILLIAMS, J. writing the memorandum, that a "'door' not walled or boarded up, but merely closed and locked" * * * "was still an entrance within the statute as fairly construed." In the present proceeding it appears, as stated, that the door knobs had been removed and nails had been driven into the doors to fasten them. But the nails could be drawn and the knobs replaced with very slight effort; and we think that a fair construction of the statute requires us to hold that these doors "are entrances still."

We conclude, therefore, that the certificate herein was obtained upon material statements in the application that were false, and that the respondents are not entitled to hold said certificate. Let an order be entered revoking and cancelling said certificate.

Upon the subject of an allowance of costs and disbursements to the petitioner, we desire to say that the disbursements seem to be unnecessarily large. There is, of course, no doubt that these disbursements have been actually incurred. But the item of stenographer's fees, for instance, is one which should not be allowed in such a proceeding except upon the stipulation of the parties. To allow disbursements in an amount equal to the costs of an ordinary action would make the proceedings unduly oppressive. For these reasons the allowance of costs and disbursements to petitioner is limited to fifty dollars.

County Court, Monroe County, April, 1897. Unreported.

PEOPLE v. CARL BREDE.

SUTHERLAND, J. Demurrer to an indictment found by the grand jury of Monroe county, charging the defendant with misdemeanor for violation of the Liquor Tax Law, by the sale of fermented and malt liquors on Sunday, July 12, 1896, at the city of Rochester.

The indictment consists of three counts. The first count reads as follows: "The grand jury of the county of Monroe by this indictment accuse Carl Brede of the crime of misdemeanor, to wit: A violation of section 31 of chapter 112 of the Laws of 1896 of the State of New York, entitled 'An act in relation to the traffic in liquors, and for the taxation and regulation of the same, and to provide for local option,' constituting chapter 29 of the general laws, committed as follows: The said Carl Brede on the twelfth day of July, in the year of our Lord one thousand eight hundred and ninety-six, at the city of Rochester, in this county, willfully and unlawfully did offer and expose for sale fermented and malt liquors, in quantities of less than five gallons at a time, to be drunk on the premises, on the first day of the week, commonly called Sunday, to a person whose name is to this grand jury unknown, and can not, therefore, be given, said person not being a guest of a hotel then and there kept by the said Carl Brede, contrary to the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity."

The second count is similar to the first in all respects except that it charges that Brede on said day at said city of Rochester "willfully and unlawfully did sell and deliver fermented malt liquors * * * to a person whose name is to this grand jury unknown."

The third count is similar to the first and second in all respects, except that it charges that said Brede on said day and at said city, "willfully and unlawfully did give away and deliver fermented and malt liquors * * * to a person whose name is to this grand jury unknown." The second and third counts respectively contain, also, an allegation that the act charged is the same complained of in the first count.

The defendant demurs to the indictment upon the following

grounds: First, that the grand jury by which the indictment is found have no legal authority to inquire into the crime charged, by reason of its not being within the local jurisdiction of the county. Second, that the indictment does not conform substantially to the requirements of sections 275 and 276 of the Code of Criminal Procedure. Third, that more than one crime is charged in the indictment within the meaning of sections 278 and 279 of the Code of Criminal Procedure. Fourth, that the facts stated do not constitute a crime. Fifth, that the indictment contains matter, which, if true, would constitute a legal justification or excuse for the acts charged or other legal bar to the prosecution.

This indictment and three others, charging the defendant with misdemeanors committed by the sale of liquor on Sunday, were found by the grand jury, which was convened in connection with the September, 1896, Trial Term of the Supreme Court. The grand jury which was convened in connection with the January, 1897, Trial Term, found seven additional indictments against Brede, charging him with misdemeanor, committed by the sale of liquors on other Sundays, and the last seven indictments are similar in form and phraseology to the first four which have been described, except that in the second and third counts of the indictment found by the January grand jury there is no allegation to the effect that the offense complained of arises out of the same act described in the first count.

When the defendant was arraigned he filed a demurrer to each of the eleven indictments above described, and each demurrer is based upon the same ground. A large number of other persons were indicted by said grand jury, the indictments in each case being similar in form to the latter Brede indictments, and counsel for said other indictments have filed demurrers to said indictments similar in form to the demurrers taken to the Brede indictments. By consent, these demurrers have been argued together, as the questions to be passed upon seemed to affect and be decisive of all cases alike.

Pomeroy P. Dickinson, for defendant Carl Brede; Thomas E. White, Philetus Chamberlain, William H. Sullivan, H. C. Spurr, William H. Beach, Charles L. McDowell, George V. Fleckenstein, Louis H. Jack, Charles F. A. Young, Irving Paine, and Delbert C. Hibbard, counsel for other defendants.

George D. Forsyth, District Attorney, for the people.

SUTHERLAND, Co. J. The first objection taken to the indictments is a denial of the jurisdiction of the grand jury to inquire into the offense and to present an indictment therefor; that the only statute under which the defendants could be punished for the illegal sale of intoxicating liquors on the day mentioned in the indictments is the Liquor Tax Law of 1896, under which the grand jury, by express words, is given jurisdiction over the offense. The Liquor Tax Law in this respect supersedes as to this class of misdemeanors that section of the charter of the city of Rochester, as amended by chapter 204, Laws of 1893, giving to courts of special sessions held by the police justice of said city, exclusive jurisdiction to hear, try and determine all charges of misdemeanor committed within the city of Rochester.

The second objection is believed to be untenable and not serious enough to require discussion.

The third ground of the demurrer is that more than one crime is charged in the indictment. This objection cannot be charged against the first four Brede indictments because in each one of them is contained the allegation that the third and fourth counts refer to the same transaction set forth in the first count, nor are the other indictments which do not contain such an allegation to be set aside for that reason. It is plain that the grand jury have intended to charge but one offense in each separate indictment, and in the three counts of the indictments have set forth three different ways in which the same offense is charged to have been committed. First, by exposing for sale; second, by a sale and delivery; and third, by the giving away of the same liquor to the same person.

This form of pleading is permissible. Code of Criminal Procedure, § 279. The indictment is drawn so as to meet the evidence as it may be brought out upon the trial, and if it should appear that the transaction was an offering or exposing for sale, the first count would be appropriate; if it amounts to a sale and delivery, the people will stand upon the second count; and if it shall appear to be the giving away of the liquor, the third count will suffice. The pleading is undoubtedly proper, if the different counts refer to the same transaction. *People v. Charbineau*, 115 N. Y. 433; *People v. Wilson*, 151 N. Y. 403. In *People v. Harmon*, 49 Hun, 558, the demurrer was sustained because the first count charged an unlawful sale upon one day and the second count an unlawful sale upon different days.

But Judge Haight, in writing the opinion of the General Term, says: "It would have been competent to have charged that the offense was committed on Sunday, the 26th day of February, by the selling of intoxicating liquors, and to have charged in the second count the same offense at the same time by the giving away of intoxicating liquors."

It is urged with particular insistence that different transactions are referred to, because it does not appear that the unknown person to whom the liquor is said to have been offered for sale, in the first count, is the same unknown person to whom it actually was sold and delivered as charged in the second count.

But the indictment is not demurrable for the misjoinder of two distinct offenses unless "it appears upon the face thereof * * * that more than one kind is charged in the indictments." Code of Crim. Proc., § 323. It does not appear upon the face of the indictment that different persons are referred to; and the fact that the indictment fails to state affirmatively that the unknown person in one count is the same person referred to in the other counts does not make the indictments demurrable. If any presumptions are to be indulged in, we must assume that the same person was intended to be referred to rather than different persons. *People v. Adams*, 17 Wend. 435.

There is no force in the objection that the facts stated in the indictment do not constitute a crime for the reason that the name of the purchaser of the liquor is not stated. It is enough that the indictment contains an averment that the name of the purchaser is to the grand jury unknown. *People v. Stone*, 85 Hun, 130.

It has also been urged upon our attention with much earnestness by counsel for the many defendants who were represented on the argument of these demurrers that it may be legitimately inferred from the language of the indictment that in each case the purchaser of the liquor was a guest at the hotel kept by the defendant, and that in order to set forth a crime the indictment should contain the further allegation that the liquor was served to the guest neither with his meals nor in his rooms or apartments therein. In this connection it is also insisted that every indictment for the illegal sale of liquor on Sunday in order to be valid must contain a negative averment to the effect that the sale was not to one of that class of persons called guests and

was not made in one of the ways in which sales to guests are permitted on Sunday by the words of the Liquor Tax Law, namely, "With their meals, in their rooms, or apartments therein, but not in the barroom or other similar room of such hotel." Liquor Tax Law, § 31. But, in my opinion, it is not necessary for the indictment to contain a negation covering the exception created by the statute in favor of a hotel keeper in selling to a guest with his meals or in his apartments. The statute contains in section 31, first of all, a general prohibition upon the selling, exposing for sale or giving away of intoxicating liquors by any person on Sunday. The particular clause in which this enactment occurs contains no qualifications whatever. At the end of section 31 two exceptions are separately noted; first, that the general prohibition thereinbefore enacted shall not prevent a regularly licensed pharmacist from selling liquor under certain circumstances upon the prescription of a physician, and, second, shall not prevent a hotel keeper who is a holder of a liquor tax certificate from selling liquor to his guests with their meals or in their rooms or apartments. The exceptions are not interpolated into the body of the clause enacting the general prohibition; therefore it becomes the duty of the defendant to bring within the exception, and the indictment need not state that he is not within the excepted class. In Bishop's New Criminal Practice, volume 1, section 635, it is said: "If there is an exception in the enacting clause the party pleading must show that his adversary is not within the exception, but if there be an exception in a subsequent clause or subsequent statute, it is a matter of defense and is to be shown by the other party." Authorities are abundant in support of this proposition. Wharton's Criminal Law, vol. 1, §§ 378, 380; Am. & Eng. Ency. of Law, vol. 10, p. 575; *Jefferson v. The People*, 101 N. Y. 19. There appears to be no more reason for negating the fact that the sale was made by a hotel keeper to his guest than that the indictment should state that the sale was not made by a pharmacist upon prescription.

But the defendants claim that each indictment contains what amounts to an admission that the purchaser of the liquor was a guest at a hotel kept by the defendant; and this contention is based upon the supposition, which the defendants put forward as sound law, that every time any person buys a drink of liquor at an inn, by that act alone he enters into

the relation of a guest of the house, and the opinion of the Delaware General Term of the Supreme Court in *McDonald v. Edgerton*, 5 Barb. 560, is relied upon as authority for the proposition contended for. But neither the facts of that case nor the opinion of the court gives support to the position of the defendants' counsel. The plaintiff McDonald sued the defendant, an inn keeper, for the value of an overcoat, and evidence was given on the part of the plaintiff to prove these facts. That the plaintiff stopped at defendant's inn on "General Training Day," soon after seven o'clock in the morning, took off his overcoat, gave it to the barkeeper and then bought liquor at the bar, for which he paid; on returning to the hotel later in the day the overcoat was missing; and the action was brought for its value by the plaintiff under the claim that he was a guest of the hotel. The evidence offered by plaintiff's witnesses as to the receipt of the coat by defendant's barkeeper was contradicted by defendant's witnesses, but purchase of liquor was not denied.

The jury in the justice's court where the case was tried rendered a verdict for the plaintiff; the judgment entered thereon was reversed by the Delaware County Court and an appeal taken from the judgment of reversal to the General Term. The Supreme Court held that whether the plaintiff was a guest or not was a question of fact that had been determined by the jury upon conflicting evidence, and reiterated the familiar rule that where there is a conflict of evidence upon a trial in a justice's court, so far as all questions of fact are concerned, the verdict of the jury is conclusive and can not be reviewed elsewhere, however much the verdict may be against the weight of evidence; and, accordingly held that it was error for the County Court to reverse the judgment, there being some evidence, at least, that the relation of landlord and guest actually existed between the plaintiff and defendant.

The Supreme Court did not hold, nor mean to say, that in all cases the mere purchase of liquor at an inn constitutes the purchaser a guest, and when Judge Mason says, after discussing the evidence, that "purchasing of the liquor was enough to constitute the plaintiff a guest," he means to be understood as holding that, assuming the evidence given by the plaintiff's witnesses as true, the purchase of liquor by the plaintiff in connection with the previous act of the barkeeper in taking his goods in custody was sufficient in that particular case to warrant the verdict of the

jury. Counsel now insists that the court intended to hold that as a matter of law the purchase of the liquor established plaintiff's status as a guest. But in the opinion Judge Mason repeatedly asserts that whether he became a guest or not was a question of fact which the jury had to decide upon disputed evidence and not a question of law. The purchase of the liquor was conceded; consequently the Supreme Court could not have believed the purchase of the liquor to be conclusive upon the question of the plaintiff's relation as a guest of the inn. *McDonald v. Edgerton* is frequently referred to in the later reports, sometimes as an authority for the rule that an appellate court can not reverse a justice's decision because it is against the weight of evidence (*Adsit v. Wilson*, 7 How. 64); and often upon the general liability of a hotel keeper for the loss of the goods of his guest; and elsewhere as authority for the proposition that the shortness of the stay of a guest at a hotel is immaterial in determining the liability of the landlord, but I have found no instance where *McDonald v. Edgerton* is referred to as holding that the purchase of liquor alone as a matter of law constitutes one a guest at an inn. It perhaps may be claimed that in *Fairchild v. Bentley*, 30 Barb. 147, the court seems to consider *McDonald v. Edgerton* authority for such a proposition.

But in *Fairchild v. Bentley* the person whose relation to the hotel as a guest was discussed, came to the hotel with his team, and the hostler pointed out the place where the team might be hitched under the shed, and then the driver went into the hotel, purchased liquors and cigars, "and," says the opinion, "thus became a guest of the house." Citing *McDonald v. Edgerton*. But the words "thus became" refer not only to the purchase of the liquor but to the putting up of the team with the consent of the hostler; and, furthermore, what was said upon that subject in *Fairchild v. Bentley* was obiter dictum, because the judgment of the lower court was reversed upon another ground, which the court says (at page 156) was fatal to the judgment whether the visitor at the hotel was a guest or not.

On the other hand, it was expressly held in *Fitch v. Casler*, 17 Hun, 126, by the General Term of the third department that the purchase of liquor at an inn does not necessarily constitute the purchaser a guest of the hotel. In that case the plaintiff went to defendant's hotel to attend a dance for which invitations had been sent out by the hotel proprietor. The dance ticket

purchased by plaintiff covered the night's supper, pay for plaintiff's horse and admission to the dance hall. The plaintiff also purchased drinks and cigars, but the court held that the relation of the innkeeper and guest did not exist because the plaintiff did not go to the hotel for the purpose of receiving the entertainment which a hotel extends to the public. Judge Learned in the opinion says: "The well-known principle of the liability of an innkeeper has been maintained in order to protect those who go to his house as to an inn or hotel." And, again, "It is true, as urged by the plaintiff, that even the purchasing of liquor has been held sufficient, under some circumstances, to make one the guest of the innkeeper. This shows that it is not the amount of refreshments, but the character under which the purchaser buys them, which determines the relation of the parties."

In *Carter v. Hobbs*, 12 Mich. 52, under somewhat similar circumstances, it was held that the plaintiff was not a guest of the hotel, although the plaintiff purchased liquor and cigars; and the courts say: "To hold the defendant liable as an innkeeper, it must appear not only that the defendant kept the inn and that the goods were lost there, but that he was acting in the capacity of an innkeeper on the occasion when the goods were received and that the plaintiff was his guest; or, in other words, that the plaintiff visited the inn for the purposes which the common law recognizes as the purposes for which inns are kept." In *Queen v. Rymer*, 2 Law Rep. Q. B. D. 136, the court for crown cases reserved held that a person residing in the same town where a hotel is situate, entering the bar-room of a hotel intending merely to purchase a drink, does not become by such purchase a guest of the hotel. In *Ingalsbee v. Wood*, 36 Barb. 452, Judge Potter (at page 46) says the word "guest" seems to mean one who relies upon or adopts the inn as his home for the time being, though the length of time which the guest remains, it seems, will not affect his right as such, provided he lives there in his transitory character as a guest. In *Castenhofer v. Clair*, 10 Daly, 265, the court says: "It is not the fact that a person does or does not take lodging or partake of refreshment in an inn that makes him a guest; it is the motive with which he enters the place, whether to use it for the briefest period or the most trifling purposes as a public house or not."

The Revised Statutes, part 1, chap. 20, art. 8, § 72 (passed in 1827), provided that no keeper of an inn or tavern authorized

to retail spirituous liquors should on Sunday sell or dispose of them except "to lodgers in such inns or taverns or to persons actually traveling on that day, in the cases allowed by law." And this was the reenactment of a previous statute. In the act for the regulation of the liquor traffic, passed in 1857, the wording of the former provision was not retained, but it was provided that "no tavern or hotel-keeper * * * shall sell or give away intoxicating liquors or wines on Sunday * * * to any person whatsoever, as a beverage." But in the matter of Breslin, 45 Hun, 210, it was held by the General Term of the first department that the Legislature did not intend by the act of 1857 to prohibit an innkeeper from selling liquor to lodgers or guests of the inn as such, but only designed to prohibit the indiscriminate sale of intoxicating liquors by him to the general public on that day. The Excise Law, passed in 1892, contained an express permission for the sale of liquors on Sunday by the holder of an innkeeper's license "to guests of such hotel * * * to be drunk by the purchaser in the inn, tavern or hotel thereby licensed, with his meals or in his rooms or apartments therein, but not in the barroom or other similar room of the inn, tavern or hotel licensed."

The Liquor Law commonly called "The Raines Bill" differs in no material respect from the Excise Law of 1892 as to the sale of liquor to a guest by a hotel-keeper, and it seems probable that the Legislature, in passing both the Excise Law and the Liquor Tax Law, intended to leave the matter substantially as it had been ever since the enactment of the Revised Statutes; the words lodgers or travelers contained in the Revised Statutes, and used by the courts in construing the act of 1857, being replaced by the word guest in the Excise Law of 1892 and the Liquor Tax Act of 1896.

In my opinion, the class of persons to whom such sales on Sunday may lawfully be made has not been enlarged by the recent legislation, and it is not now permissible for a hotel-keeper to sell to any person unless that person occupies towards his house the peculiar relation of guest; unless the purchaser has come to the hotel to receive that protection, hospitality and entertainment which inns have always afforded and which under the law they are obliged to afford to their guests. A person strolling by the entrance of a hotel, who chances to turn in and buy a drink, does not thereby become in my opinion a guest within the

meaning of the term in the Liquor Tax Law. Something more must take place; there must be an intention on his part to adopt the inn for the time being, whether long or short, as his abiding place; he must have come *infra hospitium* and be received by the innkeeper in the capacity of a guest and be considered more than a mere purchaser of liquors and cigars, which the innkeeper offers for sale to the general public indiscriminately in the same manner as they are offered for sale by any other person authorized to sell the same.

The claim made by the defendants that the allegations in these indictments of the purchase of liquor of the defendants, who are hotel-keepers, is equivalent to the admission that the purchaser was a guest, cannot be sustained and the demurrers must be disallowed.

Supreme Court, New York Special Term, May, 1897. Unreported.

PEOPLE v. ETHEL GERARD.

PEOPLE v. PATRICK McMAHON.

ANDREWS, J. Upon the complaint of a police officer, charging her with having sold wine without first having obtained a liquor tax certificate, the defendant, Ethel Gerard, was arrested under a warrant issued by a city magistrate, and held for trial at the Court of Special Sessions. The defendant, McMahon, being the holder of such tax certificate was arrested on a charge of having violated section 31 of the amended Liquor Tax Law (the Raines law) and was held for trial at the same court. Applications are now made to me on behalf of both defendants for orders transferring their cases to the Court of General Sessions, which applications are opposed by the district-attorney. The claim made on behalf of both defendants is that the court has no discretion in the matter, and that their right is absolute to have their cases so removed to a court where they cannot be placed on trial until and unless they have been indicted by a grand jury and where they will be entitled to a jury trial. In view of the public importance of this matter I have given it very careful consideration, and have reached the conclusion that these applications must be granted.

* * * * *

By the provisions of subdivision 1 of section 35, above quoted (same law) proceedings for the punishment of most of the violations of the provisions of the act must be prosecuted by indictment by a grand jury and by trial in a court of record having jurisdiction for the trial of crimes of the grade of felony. This provision applies to every portion of the State except the city of New York, and but for the amendment of this year, contained in said section 35a, would apply to the city of New York. If it did so apply it would necessarily follow that persons charged with violations of the act in the city of New York, except in cases covered by subdivision 2 of section 34, would have to be prosecuted and tried in the criminal branch of the Supreme Court, or in the Court of General Sessions. In view of the great number of persons charged with offenses of the grade of felony who are indicted and tried in those courts and of the great number of prosecutions instituted during the past year in the city of New York under the Liquor Tax Law passed in 1896, it may be fairly presumed that the object of the Legislature in adopting the amendment contained in section 35a was not to deprive persons arrested in the city of New York of the right to a trial by jury, which is given to defendants so prosecuted in every other part of the State, but to relieve the higher courts and provide a method for the speedy trial, without a jury, for all persons prosecuted for violation of the Liquor Tax Law, who should not elect to exercise the right of removal to the higher court given by the said act of 1895.

* * * * *

To construe section 35a as depriving persons arrested for a violation of this statute in the city of New York of a jury trial is, therefore, to impute to the legislature the intention of giving to defendants in every other part of the State the right to a jury trial, but of depriving all persons prosecuted in the city of New York for violations of the same law of that valuable right. The court will not impute to the legislature the intent to pass a law which would be so unequal, oppressive and unjust. In this State and throughout the United States, the right to a trial by jury in criminal cases is one of the most cherished rights of the citizen, and is embedded in the constitution of every State, and of the United States and the court should not construe an act of the legislature as depriving a defendant of such right, unless the intention to do so is expressed in the clearest

and most unmistakable terms; and especially should the the court not hold that the legislature has discriminated against persons engaged in the liquor traffic in New York city, by depriving them of the right to a trial by jury, when all persons convicted of a violation of the Liquor Tax Law and sentenced to imprisonment in that city must be confined in the penitentiary, subject to the indignity of wearing a criminal's garb, to a discipline nearly as severe as that of the State prison, and compelled to associate with the burglars, thieves and other criminals of the most hardened and abandoned character, who may be imprisoned in that place for terms not exceeding five years, under chapter 571 of the Laws of 1875. It seems to me clear, from the language used in the statute, and from all the considerations above mentioned, that said section 35a does not operate to extinguish the right of removal from the Special Sessions to the General Sessions, which exists in this city, in the case of all other misdemeanors; but, even if the statute is to be regarded as ambiguous, and susceptible of being construed either as taking away or not taking away such right, I certainly think that a just regard for the rights of persons prosecuted under it in the city of New York demands that the latter construction should be adopted.

* * * * *

Lastly, in nearly all statutes passed by the Legislature of this State, which have conferred jurisdiction upon Courts of Special Sessions, or other inferior courts, to try offenses of the grade of misdemeanors (as are most of the crimes created by the statute in question) special care has been taken to preserve the right of trial by jury, either by express provisions providing for trial by jury therein, or giving defendants an absolute right to have their cases removed to a higher court where criminal proceedings are prosecuted by indictment and trial by jury * * *. The Legislature, however, did attempt in the year 1855, when it passed "An Act for the prevention of intemperance, pauperism and crime," and again in 1857, when it passed "An Act to suppress intemperance, and to regulate the sale of intoxicating liquors" to provide for the summary punishment of certain violations of those statutes through trials by a magistrate without a jury. It was, however, decided by the Court of Appeals that this legislation was a violation of that provision of the Constitution which declares that the trial by jury in all cases in which it

has been heretofore used, shall remain inviolate forever. (Citing cases.)

If, therefore, sections 35 and 35a of the statute in question do in fact deprive persons prosecuted for the various misdemeanors created by the statute of the right of trial by jury, the provisions of those sections (under the cases above cited) which have that effect are plainly unconstitutional. Both applications to remove the cases from the Court of Special Sessions to the Court of General Sessions must, therefore, be granted.

Supreme Court, Niagara County, May, 1897. Unreported.

PEOPLE ex rel. CHARLES BEDELL v. JOHN F. KINNEY.

Habeas Corpus.

Godfrey H. Wende, for relator.

Abner T. Hopkins, for respondent.

WHITE, J.: The relator was convicted of the crime of having sold liquor without having obtained a liquor tax certificate as required by chapter 112 of the Laws of 1896, at the December, 1896, term of the County Court of Niagara county. Upon such conviction and on January 23rd, 1897, the said court sentenced the relator to imprisonment in the county jail of Niagara county for the term of six months, and imposed a fine of \$1,050.00 upon the relator and directed that he be imprisoned until the fine was satisfied, not to exceed 1,050 days. Following the sentence by the court, and on January 26th, 1897, a special deputy clerk of Niagara county made a written certificate, signed the same and affixed the seal of the court thereto, stating in substance that the relator had been tried and convicted at the December term of the Niagara County Court, upon an indictment charging a violation of the liquor tax law; that upon the said conviction the relator had been, on January 23d, 1897, sentenced to be imprisoned in the Niagara county jail at hard labor for the term of six months, and to pay a fine of \$1,050, or to be imprisoned until the fine should be paid, not to exceed 1,050 days; and, further, that it had been proved by satisfactory evidence to the court that the prisoner

had learned and practiced the trade of a saloon keeper. Said certificate states that it is a true abstract from the minutes of the court in the case in which the relator was so convicted and sentenced. The fine imposed has not been paid.

At some time after the relator was sentenced and before the writ of this proceeding was served upon the respondent, the relator was, and still remains in the custody of the respondent, and confined in the county jail of Niagara county. It does not appear when the relator was taken into such custody, nor that the respondent took him into custody by virtue of any certificate, mandate or commitment, based upon the sentence of the court; in fact, the respondent disclaimed having taken the relator into custody by virtue of any such certificate, mandate or commitment, but alleges that he took and holds him a prisoner by virtue of the sentence of the court, which was written out by the said judge in his minutes, before being pronounced, and then read as so written out, to the relator.

The relator insists that he is imprisoned and held in the custody of the respondent solely by virtue of the certificate made by the special deputy clerk above referred to.

That statute which was violated, by the relator, creates the offense of which he has been found guilty, denominates it a misdemeanor and commands its punishment by a fine of not less than seven hundred, nor more than two thousand dollars, and in addition to the fine authorizes the court to imprison the offender in the county jail for a term of not more than one year.

So in that case the court had the right to impose the amount of the fine it has imposed and to imprison for the term of six months.

The statute made it the duty of the clerk of the court in this case forthwith upon the conviction of the relator to make and file in the office of the clerk of Niagara county, a certified statement of such conviction and sentence, and thereupon it became the duty of the clerk of the county to enter in the docket book kept by him for the docketing of judgments in his office, the amount of the fine imposed upon the relator, viz., \$1,050, as a judgment against the relator, and in favor of the State Commissioner of Excise. The said clerk should also have entered in the docket of said judgment a brief statement setting forth the facts that said judgment was for a fine or penalty imposed for a violation of the liquor tax law, the said clerk should then,

and immediately, have mailed or delivered to the County Treasurer of Niagara county, or to the special deputy State commissioner of excise for that county, a duly certified transcript of said judgment. At that state of the case the relator was entitled to five days' time after having been sentenced, in which to pay the judgment which should have been so entered against him, before any further proceedings to collect the judgment could have been taken against him. If at the expiration of said five days the judgment was not paid, it then became the duty of said county clerk to issue an execution upon the judgment to the sheriff of said county, whose duty it would then have been to collect the executions as executions in civil cases, arising on contracts, are collected.

The record now before the court fails to disclose a compliance or any attempt to comply with the law, concerning the collection of the fine imposed upon the relator by the court. Instead of doing that the attempt is being made, according to the record before me, to collect the said fine by confining the relator in jail, at the expense of Niagara county, and crediting him a dollar a day for the time he passes in that manner. The two methods are inconsistent. It is a well-settled rule that where a statute creates a crime and prescribes its punishment, no other or different mode of punishment than that so prescribed can be adopted by the court.

It is for these reasons, that neither section 15 nor 484 of the Code of Criminal Procedure is applicable here, and so it follows in this case that to the extent that the judgment pronounced by the Niagara County Court against the relator commands his imprisonment until the fine imposed is paid, it is void for the reason that it contravenes the statute in that respect.

The only punishment that could be inflicted under or by virtue of a fine, under this statute is pecuniary and not physical, or by depriving the offender of his liberty.

While it is not necessary to a proper disposition of this branch of the case to pass upon the question there would seem to be no reason why the steps following the sentence as prescribed by the statute for the collection of the fine may not now be taken, if they have not been. That part of the sentence which inflicts imprisonment for the term of six months is clearly authorized by the statute, and no reason is apparent why it should not be carried out.

The relator contends that it should not for two reasons; he insists in the first place, that the imprisonment of the relator is by virtue of the certificate made by the special deputy clerk, which has already been sufficiently described and that such certificate is irregular and insufficient as authority for such imprisonment, and in the next place, that even if the authority for imprisonment for said term of six months be the sentence and not the certificate, the sentence being void in part is void in toto. Neither of these grounds is tenable.

The sentence, and not the certificate, made by the clerk, is the authority for the imprisonment for said term of six months, and even though that certificate be as it is, frankly admitted by the respondent to be irregular and not in the form prescribed by law, it may, if necessary, be amended, or a new certificate which will conform to the law, may be made, so long as the judgment which it is designed to describe and exemplify is legal and in due form. (*People v. Baker*, 89 N. Y. 467.)

As to the second proposition advanced by the relator, there seems to be no reason for holding, nor has any authority been cited to that effect, nor have I been able to discover any that holds the doctrine contended for. That part of the sentence which inflicts the punishment of imprisonment for said term of six months, is clear and distinct, and in no way dependent upon or necessarily connected with the other part of the sentence imposing the fine, and so long as the one part is within the law and is clearly separable from the other, and that other part is unauthorized and void, there would seem to be no good reason why the void part should not be treated as surplusage, and that is what should be done in this case, to the end that there may not be a miscarriage of justice. The relator was duly tried and convicted, and the law authorizes the imprisonment for said term of six months inflicted by the court.

I am of the opinion that the relator should be remanded to the custody of the sheriff of Niagara county, and that when he shall have suffered six months' imprisonment he will be entitled to be discharged therefrom.

Supreme Court, New York Special Term, Reported. N. Y. L. J.,
June 20, 1897.

In the matter of the application of HENRY H. LYMAN to revoke the liquor tax certificate of the YOUNG MEN'S COSMOPOLITAN CLUB of New York.

BEEKMAN, J.: This is an application under subdivision 2 of section 28 of chapter 112 of the Laws of 1896, as amended by chapter 312 of the Laws of 1897, known as the Liquor Tax Law, under which it is sought to obtain an order revoking and cancelling the liquor tax certificate which is held by the respondent for certain violations of the statute which are set forth in the moving papers. The proceeding is a summary one to be instituted before a Justice or a Special Term of the Supreme Court, and if the charges made are well founded an order must be made by the justice or court revoking and cancelling the certificate and all right on the part of the holder of the same to either traffic in liquors or to the return of any portion of the tax paid thereon comes to an end. It is claimed by the respondent that this involves a forfeiture of property, and that as no provision is made for the trial of the questions raised before a jury, its constitutional rights are in that regard invaded and the act in so far as it sanctions the proceeding in question is unconstitutional.

The argument in support of this proposition is largely based upon a recent decision of the Court of Appeals (*Colon v. Lisk*, decided June 8th, 1897). The case relied upon, however, is plainly distinguishable from the one under consideration. There a statute was held to be unconstitutional which provided that any interference by any person with oysters which had been lawfully planted or cultivated in waters of the State by another would not only be a misdemeanor, but that any boat or vessel used in violation of the act might be summarily seized without process or other authority, and that upon six days' notice to the person in possession and to the owner, if known, a justice of the peace should proceed to take evidence whether the vessel was used in violation of the statute, and if he should so determine, requiring him to order the same to be sold and the avails paid to the Commissioner of Fisheries, Game and Forest. The decision of

the court was placed upon the ground that the statute was in contravention of the constitutional provision which insures a trial by jury in such a case, and also that the Legislature has no constitutional right to enact a statute forfeiting to the State the property of one person upon the sole ground that he had in some manner interfered with the private rights of another; that the statute there under consideration did not come within the police power of the State, inasmuch as it related neither to the health, morals, safety or welfare of the public, but only to the private interests of a particular class of individuals.

The Liquor Tax Law is entitled "An Act in relation to the traffic in liquors and for the taxation and regulation of the same, and to provide for local option, constituting chapter 29 of the general laws." The power of the Legislature to pass such an act, even to the extent of prohibiting any such traffic, is now too well settled to admit of any doubt, and finds its sanction in the police power of the State. The certificate, which is the equivalent of a license to traffic in liquors, is property only in so far as such an attribute may be conferred upon it by the terms of the act itself. Section 27 of the act provides that it may be sold and transferred to any person not forbidden to traffic in liquors, upon the making and filing of a new application and bond by such purchaser and the presentation of the certificate to the officer who issued the same, who shall thereupon give his consent to the transfer; but this is coupled with the proviso that no such transfer shall be permitted by any holder of a certificate who shall have been convicted, or be under indictment, or against whom a complaint under oath shall have been made and be pending, for violating the provisions of the act, or who shall have violated any provision of the Liquor Tax Law. By section 25, provision is made by which a liquor tax certificate may be surrendered and a proportionate rebate of the tax returned, but this right is also conditioned upon a previous compliance with the law by the holder. The same section also provides that a receiver, assignee, committee or executor or administrator, of a corporation, association or individual to whom such a certificate may have been issued, may continue to carry on the business thus licensed for the balance of the term for which the tax was paid and the certificate given, subject to the same restrictions and liabilities, as if they had been the original applicants for and owners of such certificate.

To the extent stated, the certificate may be regarded as property, but it is property hedged about with conditions and limitations, and is held by the person to whom it was issued subject to and qualified by every one of the conditions referred to. It was accepted by him under an implied agreement that it should terminate in the manner which the statute prescribes if he should be guilty of any of the acts for which it might be cancelled. Whatever rights the certificate conferred are measured by the entire statute, and constitute the residuum after every restriction and condition imposed has been taken into account. A person receiving such a certificate must accept the burden with the benefit; and the right subject to the burden measures the extent of what he may claim to be his right of property. The so-called forfeiture therefore, does not curtail a right of property, but is the mere operation of a condition, which in a contractual sense qualified the original grant.

In the case of *Colon v. Lisk*, the ownership of the oyster boat was absolute and unqualified, and its forfeiture was in no sense whatever associated with the terms upon which the property in it was held. The provisions in the Liquor Tax Law which are here brought into question are undoubted police regulations deemed necessary for the protection of the public interests, and therefore within the competency of the Legislature to enact. The revocation of the license following a violation of the law is a reasonable and necessary exercise of power for the proper regulation of the traffic and for the promotion of the public welfare. The Legislature could not have provided for it without process of law, as that phrase is commonly understood, so that the proceeding which is required to be taken is rather a concession to the principle of fairness than a necessary compliance with the constitutional mandate.

Without further discussion, I am quite satisfied that the provision of the law which is attacked is constitutional, and that the court has power to entertain this proceeding. In accordance with the understanding upon the argument, the respondent, may, if it be so advised, interpose an answer to the petition. If this is done at the time the order herein is presented for settlement, a reference will be directed under the statute to take proof of the facts and to report the same to the court, on or before a date which will be prescribed, when the hearing will be had at Special Term upon the merits.

First Appellate Department, June, 1897. Reported. 19 App. Div. 292.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MICHAEL DURANTE and GIOVANNI DURANTE, Appellants.

A liquor tax certificate is personal property—Surrender and appropriation of the proceeds thereof, after giving a mortgage thereon.

A liquor tax certificate, issued under chapter 112 of the Laws of 1896, is personal property within the definition of personal property contained in the Statutory Construction Act (Chap. 677, Laws of 1892), and there stated to include "everything except real property, which may be the subject of ownership."

The surrender of such a certificate by licensees who have executed a chattel mortgage thereon as security for a loan made to them, and their subsequent appropriation to their own use of the rebate received on such surrender, and their refusal to pay the amount of the loan to the mortgagees, constitute a violation of section 571 of the Penal Code.

APPEAL by the defendants, Michael Durante and another, from a judgment of the Court of General Sessions of the Peace in and for the city of New York, rendered on the 1st day of April, 1897, convicting the defendants of a misdemeanor.

John Mitchell, for the appellants.

John D. Lindsay, for the respondent.

PATTERSON, J. The appellants were convicted, in the Court of General Sessions of the Peace of the city and county of New York, of a misdemeanor, for the violation of section 571 of the Penal Code, by which it is enacted that a person "who having theretofore executed a mortgage of personal property, or any instrument intended to operate as such, sells, assigns, exchanges, secretes or otherwise disposes of any part of the property upon which the mortgage or other instrument is at the time a lien, with intent thereby to defraud the mortgagee or a purchaser thereof, is guilty of a misdemeanor." On the trial of the indictment upon which the conviction was had the following facts were admitted by the defendants, viz.: That on the 1st day of July, 1896, a liquor tax certificate, mentioned in the indictment, was lawfully and duly issued to Giovanni Durante, one of the defend-

ants, to conduct a saloon at 61 James street, New York city, for the term of one year; that on the 17th day of July, 1896, the defendants executed a chattel mortgage, mentioned and set out in the indictment, to one Giovanni Lombardi, in which mortgage was included the liquor tax certificate; that the mortgage was given to secure the payment of a loan of \$400; that on the 30th of July, 1896, the defendants surrendered the liquor tax certificate to the excise department and received a rebate therefrom, which they appropriated to their own use; that prior to the surrender of the certificate, a demand for the payment of the \$400 was made by the mortgagee upon the mortgagors and not complied with, and that the amount remained unpaid up to the filing of the indictment. The defendants moved the court, after these admissions were made, that it advise the jury to acquit on the ground that the evidence as contained in the admission was of the sale and surrender of a liquor tax certificate, which was not personal property within the meaning of section 571 of the Penal Code. The motion was denied, and the defense thereupon resting, the case was submitted to the jury who returned a verdict of guilty.

The only question presented by this appeal relates to a liquor tax certificate being property which may be the subject of a chattel mortgage within the meaning of the section of the Penal Code above referred to. That section relates specifically to property upon which a mortgage or instrument intended to operate as such is a lien, and, in order to bring the case within that section, that which is the subject of the lien must be something answering the description of property and capable of being mortgaged. By the Statutory Construction Act of 1892 (Chap. 677, § 4), personal property is defined as including "everything, except real property, which may be the subject of ownership." It is a well-recognized rule that anything that may be sold or assigned may be mortgaged. Judge STORY says, in his *Equity Jurisprudence* (§ 1021): "As to the kinds of property which may be mortgaged, it may be stated that, in equity, whatever property, personal or real, is capable of an absolute sale may be the subject of a mortgage." And in *Neligh v. Michenor* (3 Stockt. Ch. 542) Chancellor WILLIAMSON held that everything which is the subject of a contract, or which may be assigned, is capable of being mortgaged. By the inclusion of the liquor tax certificate in the articles mortgaged by these defendants to Lombardi, it was

manifestly intended that, as between the parties to the instrument, that certificate should constitute part of the security for the money loaned. It may be true that, prior to the year 1893, a mere license to sell liquor did not, under the law of the State of New York, constitute property in such a sense as to make it the subject of traffic by way of sale, or that could be mortgaged — but by the provisions of the Liquor Tax Law of 1896 (Chap. 112) a different status is given, and additional qualities are annexed to a certificate granted under that act, from those which theretofore attached to simple licenses to sell liquor. The certificate is given the characteristics and some essential elements of property, limited and restricted in some respects, but, nevertheless, constituting a thing of value, over and beyond a mere personal permission to one holding it to conduct or carry on a certain business. Any one may now engage in the traffic (with certain exceptions) who shall pay the license tax and give a bond. (*People ex rel. Einsfeld v. Murray*, 149 N. Y. 367.) A person to whom a liquor tax certificate is issued may sell, assign and transfer such certificate during the time for which it was granted, under certain conditions, limitations and qualifications provided for in the act. If a person holding a liquor tax certificate dies during the term for which that certificate was given, the administrator or executor of the person so dying may surrender the certificate and have refunded the *pro rata* amount of the tax paid for the unexpired term of the certificate. The same may be done by a receiver or assignee of a corporation or copartnership, and it is also provided that if any person holding a liquor tax certificate, and authorized to sell liquors, shall cease to traffic in them, under certain circumstances, he may surrender that certificate and have refunded the *pro rata* amount of the tax paid. These provisions of the statute, therefore, recognize that a liquor tax certificate may be assets for administration; may be sold to a person not disqualified; may be surrendered, and that it has a surrender *money* value. These incidents of property being attached by law to such certificates, constitute them property in a legal as well as a popular sense; and, as they are salable and assignable, they are properly the subject of a mortgage. The mortgagee would acquire an absolute right, as between the parties to the instrument, to the certificate on default in the payment of the debt secured; for the chattel mortgage mentioned in this indictment was payable on demand, and on failure to comply

with the demand the instrument would operate as a bill of sale.

The conviction was right and the judgment must be affirmed.

RUMSEY, WILLIAMS, INGRAHAM and PARKER, JJ., concurred.

Judgment affirmed.

Fourth Appellate Department, June, 1897. Reported. 19 App. Div. 627.

In the Matter of the Application of ALEXANDER D. JENNY, as Receiver, etc., for a Writ of Mandamus.

Order affirmed, with costs. All concurred.

Supreme Court, Chautauqua Special Term, July, 1897. Unreported.

In the matter of the petition of ERASTUS C. HYDE to revoke a liquor tax certificate of CORTÉZ D. McALLISTER.

WOODWARD, J.: The petitioner in this proceeding, Erastus C. Hyde, asks to have this court cancel liquor tax certificate No. 22984, held by the defendant Cortez D. McAllister, upon the grounds that two of the statements contained in the application for such certificate, and which are required by the statute to be stated, are false. The application for revocation is made under the provisions of section 28 of chapter 112 of the Laws of 1896, which went into effect on the 23rd day of March of that year, and is based upon subdivision 8 of section 17. This statute was enacted for the primary purpose of raising a revenue; it is known by its short title, as the "Liquor Tax Law," and it is the duty of the courts, in giving it effect, to so construe it as to promote this object, consistently with its limitations. This view of the question is justified, not alone by the rule that all laws are to be construed to promote the objects for which they were enacted, but by the language of the law itself, which makes it discretionary with the court to decide whether the "material statements in the application of the holder of such certificate were false," and denying the right of appeal. The question thus presented to this court is, therefore, whether the statements of this defendant,

made in his application for a certificate under the provisions of the Liquor Tax Law, and which are alleged to be false, are "material." If they are not, then this application must be denied.

Subdivision 8 of section 17 says that "when the nearest entrance to the premises described in said statement as those in which traffic in liquor is to be carried on is within two hundred feet of the nearest entrance to a building or buildings occupied exclusively for a dwelling, there shall also be so filed simultaneously with said statement a consent in writing that such traffic in liquors be so carried on in said premises during a term therein stated, executed by at least two-thirds of the owners of such buildings within two hundred feet so occupied as dwellings, and acknowledged as are deeds entitled to be recorded, except that such consent shall not be required in cases where such traffic in liquor is actually lawfully carried on in said premises so described in said statement when this act takes effect." The statement of the defendant was made on the 10th day of April, 1897, and in answer to the question, "Was such traffic in liquors actually lawfully carried on in the said premises at the time of the passage of this act?" he said "yes," when, as a matter of fact, there was no building upon the property at that time. In answer to the next question, "Is the nearest entrance to the described premises within two hundred feet of the nearest entrance to a building or buildings occupied exclusively for a dwelling, and, if so, how many owners are there of such building or buildings?" The defendant answered, "No," although there was a building within two hundred feet occupied by a family at the time. These two answers constitute the two alleged false statements in respect to this liquor tax certificate, and the court is charged with the duty of determining whether these statements are false, and if so, if they are "material."

If there was no "building or buildings occupied exclusively for a dwelling" within two hundred feet of the premises occupied by this plaintiff and described in the statement, then the answer to the first question is entirely immaterial, for there could be no occasion for an exception, and the question of whether the premises were used in the lawful sale of liquor at the time of the act going into effect could have no possible bearing. This was an exception in favor of the person seeking the license, and in aid of the policy of the law, to collect the largest possible revenue, and was material only when there was a "building or

buildings occupied exclusively for a dwelling" within a distance of two hundred feet. The defendant explains this misstatement by saying that the blanks were filled out by a lawyer; and that he misunderstood his reading of the question and had in mind that the question asked was whether the premises had been used last year for the sale of liquors.

It is conceded on the part of the defendant if there were in fact buildings within two hundred feet, used "exclusively for a dwelling," that this would constitute a "material" falsehood, and would be sufficient to justify the court in annulling the certificate, but it is contended, and the contention is sustained by a preponderance of evidence, that the building in question was at that time used as a public resort; that up to the first of March, 1897, it was used in the illegal selling of liquors, in connection with cigars and refreshments, and that at that time the woman who conducted the establishment ran away, leaving it in charge of her nephew and her children, and that its general character was in no wise changed except that no liquors were sold upon the premises, though the public were free to come and go, and it was the custom when visitors desired drink, to go out and get it for them at a place across the street. In short the place was a rendezvous of men and women of questionable reputations, who were in no wise disturbed by the presence of the hotel of the defendant. and, as the obvious intent of this provision was to protect bona fide homes from the encroachments of hotels and liquor-selling establishments, and the dwelling under consideration having been used for immoral purposes, and a public resort, the statement of the defendant in so far as it related to the presence of "a building or buildings occupied exclusively as a dwelling" within two hundred feet, was not false, and his prior statement that the sale of liquors was actually carried on in the premises at the time the Liquor Tax Law went into effect, is, therefore, immaterial. In other words, the defendant would have established his right to a certificate if he had answered this question in the negative, and his formal statement made under a misapprehension, cannot operate to deprive him of his property, or to defeat the object of the law in producing a revenue to the State.

The prayer of the petitioner is denied, with costs.

Supreme Court, Tompkins Special Term, July 6, 1897. Unreported.

In re JAMES H. COLE for a Writ of Mandamus against CHARLES INGERSOLL as County Treasurer, to compel the issuance of a liquor tax certificate.

J. and T. E. Courtney, for relators.

M. N. Tompkins, for respondents.

SMITH, J.: At the threshold of this proceeding the relator is met with the objection that his proper remedy for the grievance of which he complains is certiorari. This objection, I think, is well made. The statute is explicit in its terms and provides therein for a mode of review.

That mode, I think, was intended to be and is exclusive. The above proceedings, therefore, must be dismissed with ten dollars costs in each case.

County Court, Rockland County, August, 1897. Reported. 21 Misc. 188.

The People of the State of New York on the relation of CHRISTOPHER FISHER, for Writ of Certiorari, v. JOHN M. HASBROUCK, County Treasurer of the County of Rockland.

1. A town meeting need not be kept open continuously from sunrise to sunset.

The provisions of the statute (Laws of 1890, chap. 569, § 29) that "Town meetings shall be kept open for the purpose of voting in the day time only, between the rising and setting of the sun," do not require that the polls, at a town meeting, shall be open at sunrise and shall be kept open continuously until sunset; and the fact that the polls at an annual town meeting, to which was submitted, under section 16 of the Liquor Tax Law of 1896, the question whether traffic in liquors should be permitted in the town, were closed about an hour before sunset, does not invalidate the decision of the town, as shown by the votes cast at the election, that such traffic be forbidden.

2. Election board—Acts not reviewable by certiorari.

The acts of an election board are not judicial in character, can not be reviewed directly by a writ of certiorari, nor can they be reviewed

collaterally in such a manner by a person who was denied a liquor tax certificate and who asserts that the town election, which decided against traffic in liquors in the town, was illegal because the polls were closed an hour before sunset.

CERTIORARI to review the determination of the treasurer of Rockland county in refusing to grant to the relator a liquor tax certificate.

Frank S. Harris, for relator.

Harvey Debaun, for respondent.

TOMPKINS, J.: This is a special proceeding by writ of *certiorari*, to review the action of the county treasurer in refusing to grant to the relator a liquor tax certificate under the Liquor Tax Law of the State.

The petition shows the relator to be a resident of the town of Ramapo in Rockland county, and a citizen of the United States, and that he possesses all the qualifications required for the issuing of a liquor tax certificate in a town where the trafficking in liquors is authorized by law, and the vote of the inhabitants thereof.

It appears that on the 12th day of May, 1897, the petitioner duly applied to the county treasurer for a certificate under subdivision 1 of section 11 of the Liquor Tax Law, accompanying his application with a duly executed and sufficient bond and a legal tender of the license fee or tax fixed by the statute to be paid in towns.

His application was refused—the petition stating that such refusal was based upon the fact that at the preceding town election a majority of the votes had been cast in the negative on all of the liquor propositions.

The relator's contention in the proceeding is that the election was irregularly conducted and was illegal, and hence there was no legal determination against the issuing of licenses or certificates in that town and the writ of *certiorari* was granted under subdivision 1 of section 28 of the Liquor Tax Law which provides as follows: "Whenever any officer charged with the duty of issuing * * * a * * * liquor tax certificate under the provisions of this act shall refuse to issue the same, * * *

such applicant shall have the right to a writ of *certiorari* to review the action of such officer." The section further provides: "If such judge or justice shall upon the hearing determine that such application for a liquor tax certificate * * * has been denied by such officer without good and valid reasons therefor, and that under the provisions of this act such liquor tax certificate should be issued, such judge or justice may make an order commanding such officer to grant such application, etc."

The return made by the respondent alleges—That at the annual town election held in and for the town of Ramapo, on the 2d day of March, 1897, pursuant to section 16 of the Liquor Tax Law, the following proposition (among others) was submitted to those qualified to vote at such election:

"Shall any corporation, association, copartnership or person be authorized to traffic in liquors under the provisions of the subdivision 1 of section 11 of the Liquor Tax Law in the town of Ramapo?"

That the total vote of said town in favor of the proposition was 517; and the total vote against it was 665; making a majority of 148 *against the granting of such a license as the relator applied for.*

The respondent further shows that a recanvass of the vote on said proposition was had with the same result and that said proposition was declared defeated by the canvassing board of said town; and before relator's application was made, a certified copy of the statement of the result of said election and vote was filed by the town clerk of said town, with said treasurer; and that he refused to grant such license and certificate on the ground that at the said election a majority of the votes had been cast in the negative upon said proposition and that under the law he was not authorized to issue the certificate asked for, and that he returned the relator's application and bond.

No part of the return is traversed by the relator—on the contrary the petition sets forth the result of the election and states the same majority against the proposition as is shown by the return.

The petitioner's whole case is based upon the alleged irregularity of the election.

It is conceded that the polls of the several election districts of the town were closed at 5 o'clock in the afternoon—and it is contended by the petitioner that the polls should not have been closed

until sunset (nearly one hour later) and that persons entitled to vote were deprived of the right and hence the election was illegal.

In short, the relator seeks to have the legality of the town election determined in this proceeding against the county treasurer.

Assuming that I have power in this proceeding to pass upon the legality of the acts of the inspectors of the election, I have come to the conclusion that the closing of the polls at 5 o'clock in the afternoon does not invalidate the election or the results thereof.

Section 29 of chapter 569 of the Laws of 1890 provides:

"Town meetings shall be kept open for the purposes of voting *in the daytime only*, between the rising and setting of the sun."

Construing this statute, Judge Bradley of the Appellate Division, Second Department, in the case of *The People ex rel. Van Sickle v. Austin*, 46 N. Y. Supp. 526, says: "It appears that the polls were opened at 9 o'clock in the morning and continued open from that until sunset, except one hour, from 12 o'clock noon until 1 o'clock, p. m.; unlike the statutory direction applicable to general elections, the statute in question does not, in express terms, provide the hour or time the polls shall be open or that there shall be no adjournment or intermission until the polls are closed. Laws 1896, chapter 909, section 3."

"The language of the provision of the present statute as to the time that town meetings shall be kept open for purposes of voting is substantially no different than it has been for upward of eighty years (2 R. L. 127; 1 R. S. 342, § 16), and it never has been so construed as to require that the polls of town meetings be opened at sunrise or continuously kept open until sunset * * * but the contrary has been held by the courts." (*People ex rel. Van Sickle v. Austin*, 46 N. Y. Supp. 526.)

"It is not necessary that a town meeting should be kept open from sunrise to sunset, but only during the daytime or some part thereof." (*People ex rel. Simonson v. Martin*, 5 N. Y. 22.)

The statute in operation at the time of the above decision by the Court of Appeals was substantially like the present law and provided that the polls should be kept open only during the daytime, between the rising and the setting of the sun.

To the same effect was the decision of the Supreme Court in the case of *Goodel v. Balter*, 8 Conn. 285: The petition alleges (and it is not denied) that it had been the custom for years in

the town of Ramapo to keep the polls open uninterruptedly from sunrise to sunset, and it is contended on behalf of relator that in closing them at 5 o'clock there was a departure from the established custom, without notice, by which legal votes were excluded "and the result changed" and the affidavits of nineteen or twenty persons are submitted showing that they were entitled to vote and intended to vote "yes" on the proposition but were prevented from so doing by the early closing of the polls. Their votes, however, would not have changed the result so far as proposition No. 1, which provides for the certificate applied for by the relator, is concerned, because the majority against it was 148.

It is urged by the counsel for the relator that the submission of the proposition to less than the whole number of legally qualified voters desiring to vote thereon was not such a submission as is contemplated by the law. Such a claim would undoubtedly be good, if the election had not been lawfully conducted and qualified voters sufficient in number to change the result had been deprived of an opportunity to vote. In that event, one who was injured thereby should have redress, but here, if all those who were deprived of a vote had voted in favor of proposition No. 1, it would not have changed the result, and relator's position as an applicant for a liquor tax certificate under that subdivision would have been no better than it is to-day.

There are other reasons which require a dismissal of the writ, which it is not necessary to discuss at length. There is no provision of statute or authority of law for reviewing the election by *certiorari*. It has been held that the acts of an election board are not judicial in character and hence cannot be reviewed by *certiorari*. (*People ex rel. Van Sickie v. Austin*, 46 N. Y. Supp. 526.)

If not reviewable in a proceeding against them, they cannot be collaterally, in a proceeding against the county treasurer.

Section 4 of chapter 16 of the Liquor Tax Law provides that "if for any reason the four propositions provided to be submitted herein to the electors of a town shall not have been properly submitted at such annual town meeting, such propositions shall be submitted at a special town meeting duly called," etc.

In my opinion, if the occasion arises for such a special town meeting, it must be called by the town board or the officer or officers charged by law with the duty of calling town meetings,

and if in a proper case such officer or board of officers refuse to do so a writ of *mandamus* would lie to compel the calling of a special election.

The certified copy of the statement of the result of the election filed with the county treasurer by the town clerk was conclusive upon him.

The statute says: "A certified copy of the statement of the result of the vote * * * shall, immediately after such submission, be filed by the town clerk * * * with the county treasurer * * * and no liquor tax certificate shall thereafter be issued," etc.

The county treasurer would have violated the law had he granted a certificate to the relator, and it necessarily follows that upon a review of his acts by the court he will not be required to do so.

The writ of *certiorari* to review the action of the county treasurer, provided for by section 28 of the Liquor Law, was intended for cases where that official had the power and was charged with the duty of issuing certificates, but failed or refused so to do. It was intended only to grant power to a judge of the court to compel the county treasurer to grant certificates in proper cases.

It was never the purpose of the law that a county treasurer, after having a statement filed with him by the town clerk certifying that a majority of the voters had decided against licenses, should go about to ascertain whether the election was regular or not, and if, in his judgment, it was not, to ignore the certified statement and issue licenses, and if that is not the duty of the county treasurer a judge cannot, by an order in a *certiorari* proceeding, compel him to do so.

For the reasons stated the writ of *certiorari* is dismissed and the determination of the respondent confirmed.

Because no brief was submitted on behalf of the respondent and thereby all the work of looking up the law and authorities was thrown upon the court, I am inclined to grant no costs to respondent; I will hear the attorneys, however, on that question.

Writ dismissed.

Third Appellate Department, September, 1897. Reported. 20 App. Div. 483.

NATHANIEL NILES, Plaintiff, *v.* MARTIN MATHUSA and THE
HINCKEL BREWING COMPANY, Defendants.

A liquor tax certificate is a chose in action—It is assignable on demand as security for advances—A delivery not necessary—It need not be filed—What laches do not impute fraud.

A liquor tax certificate, issued under the provisions of chapter 112 of the Laws of 1896, having, by statute, a surrender value, passing to personal representatives and being assignable upon certain terms to any corporation, association, copartnership or individual not forbidden to traffic in liquor, must be deemed to be a chose in action; as such it is assignable without delivery to a corporation which has advanced moneys to the licensee in order to enable him to procure the certificate, and such assignment need not be recorded as a chattel mortgage in order to make it valid as against creditors of the licensee.

Where the agreement made is to assign the certificate to the corporation on demand, the demand may be made at the time that an application is made by a judgment creditor of the licensee to procure in supplementary proceedings the appointment of a receiver of his property.

A delay of some seven months, in making a demand of the licensee that he assign the liquor tax certificate, does not establish *laches*, amounting to fraud as against the creditors of the licensee.

SUBMISSION of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

The submission in this case sets forth that the defendant Martin Mathusa, on the 6th day of June, 1896, obtained what is known as a \$500 license under the provisions of chapter 112 of the Laws of 1896, authorizing him to traffic in and sell liquors at No. 22 Franklin street in the city of Albany, and under such license engaged in and conducted said business from the time of the issuance thereof down to the 18th of January, 1897. At the time the license was issued the Hinckel Brewing Company furnished said Mathusa the sum of \$283.33 for the purpose of enabling him to obtain the same, and it was agreed that the said Hinckel Brewing Company should have a lien on the certificate and that it should be considered its property until said sum of \$283.33 was paid in full. And said Mathusa thereupon executed the following instrument:

“ALBANY, N. Y., U. S. A., *June 6th*, 1896.

“I hereby agree to assign, transfer and set over to the Hinckel Brewing Company on demand, license numbered 13,795, taken

out in my name, for and in consideration of the sum of \$283.33 loaned to me for the purpose of purchasing said license, to be the property of the Hinckel Brewing Company; and until sum of \$283.33 is paid in full the license is the property of the said company.

“MARTIN MATHUSA.”

The plaintiff on or about the 1st day of December, 1896, obtained a judgment against the defendant Mathusa for \$160 damages and costs, which at said time was duly docketed in the county of Albany; execution was issued on said judgment on the 1st of December, 1896, and returned unsatisfied. On the 2d day of December, 1896, the plaintiff procured an order in supplementary proceedings, and the defendant Mathusa was afterwards examined thereunder. On the 9th day of January, 1897, an application was duly made for the appointment of a receiver of the property of said judgment debtor. On the application Mathusa and the Hinckel Brewing Company claimed that the liquor tax certificate issued as aforesaid to Mathusa was not his property, but belonged to the Hinckel Brewing Company by virtue of the oral agreement and the assignment above set out.

The court before whom the proceedings were had appointed a receiver of the property of Mathusa, but permitted him to transfer and deliver the liquor tax certificate in question to the Hinckel Brewing Company.

The question submitted is whether or not, under the facts above stated and the assignment above set forth, a valid legal or equitable assignment of the liquor tax certificate was created in favor of the Hinckel Brewing Company, superior to the lien of the plaintiff by virtue of his judgment, execution and supplementary proceedings.

H. A. Peckham, for the plaintiff.

J. Murray Downs, for the defendants.

PUTNAM, J. Under the provisions of chapter 112 of the Laws of 1896, the defendant Mathusa, by the liquor tax certificate issued to him, obtained the right to sell and traffic in liquor at his place of business in the city of Albany. By section 25 of the act, if thereafter he should choose to discontinue the traffic, he

was authorized to surrender the certificate, and was thereupon entitled to receive a *pro rata* amount of the tax paid for the unexpired term. If a receiver or assignee should thereafter be appointed of his property, or he should die and an executor or administrator of his estate should be appointed, such receiver, assignee, executor or administrator could surrender such certificate and receive the cash value thereof for the unexpired term; or, under certain restrictions and regulations, could continue the same business on the same premises. By section 27 of the act Mathusa could sell, assign and transfer the tax certificate to any corporation, association, copartnership or individual not forbidden to traffic in liquor under the provisions of the act. Although under this section the assignee could not continue to carry on the business of trafficking in liquor without the consent of the officer who issued the certificate, or his successor, under the provisions of sections 27 and 28 of the act, such consent could not be arbitrarily refused. If the assignee was not forbidden to traffic in liquors under the provisions of the act or under the subdivision of section 11, under which the certificate was issued, it cannot be doubted but that he had a legal right to the consent of the officer who issued the certificate, and that the giving of such consent would be directed by the court under the provisions of section 28 of the act.

Under the provisions of the statute we see no reason to doubt that the defendant Mathusa could sell and assign his interests in the liquor tax certificate in question, either absolutely or in the way of a security for the money advanced by the Hinckel Brewing Company to enable him to procure the license. Although, to enable the latter as an assignee to carry on the business under the certificate, it was necessary for it to obtain the consent of the officer who issued the same, yet the assignment must necessarily precede such consent. And if such consent to an assignment was necessary when, as in this case, the assignee merely desired to surrender the certificate and recover the cash value thereof, as we have seen, it could not be arbitrarily refused, but under the provisions of section 28 the officer who issued the same could be compelled to grant it.

It cannot be doubted but that the liquor tax certificate in question conferred upon the defendant Mathusa a property right. This is conceded by the parties. It was a right not only to do business, to sell and traffic in liquors at his place of business in

the city of Albany, but also, under certain circumstances, a right for him, his assigns, executors or administrators, to recover a certain sum from the State.

Under the contract between Mathusa and the State the former would not be entitled to recover of the latter the surrender value of the certificate unless he should thereafter discontinue the business of trafficking in liquors. The right given to Mathusa under the certificate to receive from the State, under certain circumstances, the *pro rata* amount of the tax paid for the unexpired term, was, therefore, a contingent one. We think, however, the assignment made by Mathusa to the Hinckel Brewing Company valid. It is a well-settled principle that "courts of equity will support assignments, not only of *choses in action* and of contingent interests and expectancies, but also of things which have no present, actual or potential existence, but rest in mere possibility; not, indeed, as a present, positive transfer, operative *in presenti*, for that can only be of a thing *in esse*, but as a present contract, to take effect and attach as soon as the thing comes *in esse*." (Story's Eq. Juris. § 1040; *Williams et al. v. Ingersoll et al.* 89 N. Y. 508; *Harwood v. La Grange*, 137 id. 538; *Holmes et al. v. Evans et al.*, 129 id. 140; *Fairbanks v. Sargent*, 104 id. 108; S. C., 117 id. 320.)

It is urged by the plaintiff that the assignment under which the Hinckel Brewing Company claimed is in the nature of a mortgage, and, not having been filed, was void as to creditors. In *Booth et al. v. Kehoe et al.* (71 N. Y. 341), where an instrument transferring a lease as a security for a debt was considered, MILLER, J., referring to the provisions of the statutes requiring the filing of a chattel mortgage, said: "They relate to goods and chattels which can be removed from one place to another, and the possession thereof changed, and not to chattels real, or a chose in action." In *Harrison v. Burlingame* (48 Hun, 212) it was decided that the statute in relation to the filing of chattel mortgages did not apply to a mortgage of a mortgage. The same doctrine was stated in *Freeman v. Rich* (64 Hun, 478), of an assignment of accounts as security for a debt. (See also, *Fairbanks v. Sargent*, *supra*; *Williams et al. v. Ingersoll et al.*, *supra*.)

The learned counsel for the plaintiff urges that the right of one having a liquor tax certificate to recover its surrender value is not a chose in action; that when the license was issued "a

tangible piece of property, capable of actual transfer and reduction to possession, came into existence"; that its surrender value could not be recovered without a surrender of the certificate; it could not be assigned without a delivery; that the right of a licensee under the statute in question is so intimately associated with and dependent upon the paper or written tax certificate delivered to him by the officers of the State, that such paper itself must be deemed the property obtained by the licensee, and a chattel.

We are unable to accede to this view. We regard the right of Mathusa, under the certificate granted to him, to be paid the *pro rata* amount of the sum paid on obtaining a license, as in the nature of a chose in action. In *People ex rel. Stanton v. Tioga, C. P.* (19 Wend. 73, 75) COWEN, J., defines a chose in action as "not only a demand arising on contract, but also on wrong or injury to the property or person." In 3 American and English Encyclopædia of Law, 235, a chose in action is defined as "a right of proceeding in a court of law to procure the payment of a sum of money." The demand of Mathusa under his certificate to a rebate arose under a contract between him and the State. The payment of the sum to which he was entitled on the surrender of his certificate could be enforced by legal proceedings. It does not matter what form of action or legal proceedings he might be compelled to adopt to enforce his demand. He or his assignees, under his contract with the State, had the right to demand payment of a certain sum of money, which right he could enforce by mandamus or other legal proceedings. This right was in the nature of a chose in action, and not the less so because he or his assigns would only be entitled to exercise that right on discontinuing the sale of liquors under the license.

What Mathusa in effect assigned to the Hinckel Brewing Company was not so much the paper given the former by the State, but the rights derived by him under that paper — the right to traffic in liquor, and a right to a rebate on the discontinuance of that traffic. It was no more the assignment of a chattel than the assignment of the lease considered in *Booth et al. v. Kehoc et al.* (*supra*), or the assignment of the mortgage referred to in *Harrison v. Burlingame* (*supra*). In the case last cited the right of the mortgagee was derived from and dependent upon the written indenture of mortgage just as much as Mathusa's right to traffic or to a rebate upon discontinuing such traffic was

dependent upon the certificate. If the mortgagee in the case cited had sold the mortgage, a delivery of the instrument would have been necessary, and on the foreclosure and collection thereof he would have been compelled to surrender the security. As in the case cited, the mortgagee was secured certain rights under the written indenture of mortgage, so Mathusa, under the written tax certificate in question, was secured the right, under certain circumstances, to be paid the surrender value thereof.

It is claimed that the agreement to assign is conditioned upon demand; that no demand has been made and hence no lien is created. The plaintiff under his judgment, execution and the proceedings he has taken, only took such right in the certificate in question as Mathusa had at the time. Mathusa's right was subject to the claim of the Hinckel Brewing Company under the oral and written contract admitted in the submission. A demand under said contract could be made at any time. It is made now.

It is also urged that the said company has been guilty of such *laches* in enforcing its lien as to show fraud. We are of opinion, under the circumstances of the case, that the mere delay of the company in enforcing its equitable rights is not enough to charge it with fraud, although it is true that such delay, under other circumstances and in connection with other facts, might tend to indicate a fraudulent intent. But there are no other circumstances shown to substantiate the charge of fraud. It is conceded that the defendant, the Hinckel Brewing Company, advanced \$283.33 to enable Mathusa to obtain the certificate, and that it has not been repaid that sum. We do not feel justified in holding that the mere delay of the company in collecting the sum it had advanced is sufficient to indicate a fraudulent intent on its part, or that, under all the circumstances, the creditors of Mathusa have been injured by the action of the Hinckel Brewing Company in the matter.

We, therefore, conclude that the defendants are entitled to a judgment for the relief demanded, with costs.

All concurred.

Judgment for defendants for relief demanded, with costs.

Second Appellate Department, October, 1897. Reported. 20 App. Div. 566.

RICHARD A. MCNEELEY, Respondent, *v.* JOHN WELZ and CHARLES ZERWECK, Appellants, Impleaded with HENRY W. MICHELL and Others.

Liquor Tax Law of 1896—A liquor tax certificate can not be levied upon under an execution—Construction of a chattel mortgage of a license and its “renewal”—What will be construed to be an action to foreclose it—Costs against a defendant claiming to have an interest.

A liquor tax certificate issued under chapter 112 of the laws of 1896, and a surrender receipt therefor are, neither of them, evidences of debt upon which the Code of Civil Procedure, section 1411, authorizes an execution to be levied.

A chattel mortgage given May 15, 1896, which covers “the right of the mortgagor to a license to sell beer or to a renewal thereof,” embraces a liquor tax certificate subsequently issued in renewal of the license under chapter 112 of the Laws of 1896.

A complaint in an action brought to procure a determination as to the mortgagee's rights to the amount of the rebate on the surrender of the liquor tax certificate, considered to be an action to foreclose the mortgage and consequently to bring the subject-matter of the action within equitable cognizance.

What is sufficient to show that a defendant claimed an interest in the subject of the action, and consequently to entitle the plaintiff to costs as against such defendant.

APPEAL by the defendants, John Welz and Charles Zerweck, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 16th day of March, 1897, upon the decision of the court rendered after a trial at the Kings County Special Term.

The complaint in this action asked as relief that the plaintiff be adjudged to be entitled to the rebate upon the liquor tax license certificate which is referred to in the opinion; that the defendants be declared to have no title thereto, and that the plaintiff have judgment for the amount thereof against the defendant Michell.

M. Hallheimer, for the appellants.

George D. Armstrong and *E. D. Benedict*, for the respondent.

WILLARD BARTLETT, J. On May 15, 1896, Emil Schiellein, who was then engaged in the business of selling liquor at a place

called Ruffle Bar, in Kings county, executed to the plaintiff a chattel mortgage to secure the repayment of a cash loan of \$2,200. This mortgage covered furniture, household goods and other personal property used by the plaintiff in his business, and also all his right, title and interest "to a license to sell beer or to a renewal thereof." Schiellein subsequently, on June 23, 1896, obtained a liquor tax certificate from Henry W. Michell, the special deputy commissioner of excise for Kings county, under the new Liquor Tax Law. (Chap. 112, Laws of 1896.) He retained this certificate until October 31, 1896, when he surrendered it to the special deputy commissioner, from whom there then became due to Schiellein a rebate of \$325, but not having the money with which then to pay this rebate, that officer gave him an instrument known as a surrender receipt, stating that the sum of \$325 was payable on the surrender certificate out of any excise money thereafter received from the city of Brooklyn or county of Kings, or in any other manner thereafter legalized. No money has yet been paid on the surrender.

Meantime the appellants Welz and Zerweck had sued Schiellein upon a promissory note for \$600, and had obtained judgment against him upon which an execution was issued, under which a deputy sheriff of Kings county, on October 15, 1896, assumed to levy upon Schiellein's tax certificate and its surrender value. This he did by serving upon Mr. Michell, the special deputy commissioner of excise, a notice in writing informing that officer that he had levied upon all the leviable right, title and interest which Emil Schiellein had on October 1, 1896, or at any time thereafter, in whose hands soever the same might be, in and to a liquor tax certificate then in the commissioner's possession. The deputy sheriff did not see the liquor tax certificate at the time in the commissioner's office, nor was it there in fact, nor did he see any money purporting to belong to Schiellein. The certificate had not yet in fact been surrendered.

Upon the oral argument we intimated a pretty strong opinion that a liquor tax certificate, issued under chapter 112 of the Laws of 1896, was not subject to levy under execution. To this opinion we adhere. Such a certificate does not fall within any class of those evidences of debt upon which the Code authorizes an execution to be levied. (Code Civ. Proc. § 1411.)

That the liquor tax certificate was embraced within the terms of Schiellein's mortgage to the plaintiff we think is equally plain.

As the learned trial judge suggests, the defendant Schiellein, by referring in the mortgage to a renewal of his license, must have had in contemplation its renewal in the only manner possible under the new law, that is, by taking out a liquor tax certificate.

We find no difficulty, therefore, in sustaining the conclusions of the court below to the effect that the appellants took nothing by their attempted levy upon the liquor tax certificate, and that the plaintiff under his mortgage became entitled to the \$325 rebate thereon.

It is not so clear that the plaintiff was entitled to have his rights to this fund determined in equity instead of resorting to a suit at law; but, as the real points of difference between the litigants have been fully and fairly tried out and decided, the judgment should be upheld if there be any reasonable view upon which the equitable jurisdiction of the court can be asserted. We think the action may be regarded as a suit to foreclose the plaintiff's mortgage so far as it related to the liquor tax certificate, and hence as cognizable in equity. Thus viewed, the appellants were proper parties defendant, for the proof that the deputy sheriff attempted to levy on the certificate by direction of their attorney is sufficient to show that they really claimed an interest in the rebate as alleged in the complaint. Indeed, the only denial of this allegation is a statement in the answer that they have no knowledge or information sufficient to form a belief as to the matter, which statement is incredible. A defendant must know whether he makes or does not make a particular claim. Inasmuch, therefore, as the appellants have evidently been persistent in their efforts to obtain a fund to which the plaintiff has established his right, we think the award of costs against them should stand as well as the rest of the judgment.

All concurred.

Judgment affirmed, with costs.

Second Appellate Department, October, 1897. Reported. 21 App. Div. 210.

THE D. M. KOEHLER & SON COMPANY, Appellant, v. HENRY FLEBBE, Defendant.

FRANK J. CONNOLLY, as Receiver, etc., of HENRY FLEBBE, Appellant; GEORGE I. AMSDELL, Respondent.

A liquor tax certificate—An assignment of, as security, need not be filed as a chattel mortgage—A receiver compelled to deliver it to the assignee.

A person who has furnished money to procure a liquor tax certificate, to one who has assigned it to the lender as security for the repayment of the loan, is entitled to its possession as against a subsequently appointed receiver of the property of the apparent owner who has come into possession of it.

Such a certificate being a chose in action, its assignment need not be filed as a chattel mortgage in order that its continued retention by the assignor shall not render it void as to his creditors.

APPEAL by the plaintiff, the D. M. Koehler & Son Company, and Frank J. Connolly, as receiver, etc., of Henry Flebbe, from an order of the Supreme Court, made at the Dutchess Special Term and entered in the office of the clerk of the county of Dutchess on the 29th day of July, 1897, directing the said receiver to deliver a liquor tax certificate to the respondent, George I. Amsdell.

Wood & Morschauser, for the appellants.

Gaius C. Bolin, for the respondent.

BRADLEY, J. In proceedings supplementary to the execution issued upon the judgment against the defendant Flebbe, Connolly was appointed receiver of his property and obtained from him the possession of a liquor tax certificate. Before the judgment was recovered, Amsdell had advanced to the defendant the sum of \$300 to enable him to obtain the certificate. It was taken in the name of the defendant, who, pursuant to the understanding when the money was advanced, assigned the certificate to Amsdell as security for the repayment of the money; and before the receiver so obtained the possession of the certificate the

defendant had paid to Amsdell seventy dollars of the amount so advanced. The order was made upon the motion of Amsdell for direction to the receiver to surrender the certificate to him. Upon those facts he was entitled to it unless there is some statutory provision having the effect to deny such relief to him.

It is urged (1) that the transfer of the certificate was void as against the creditors of the defendant; (2) that the certificate was not assignable to Amsdell.

In support of the first proposition it is insisted that the assignment came within the provisions of the statute relating to a mortgage of goods and chattels; and that, as the assignment was not filed, the continued possession of the mortgagor rendered it ineffectual against creditors. The difficulty with that assumption is that the certificate is a mere chose in action, and while the assignment was otherwise in the nature of a mortgage of personal property, it did not come within the statute relating to mortgages of goods and chattels, as those provisions of the statute relate only to things in possession as distinguished from those in action. And, therefore, as against the creditors of the defendant, no filing of the instrument of assignment was required, nor was the possession by the assignee essential to the support of his claim to the certificate. The creditor does not, nor does the receiver, have the character of a *bona fide* purchaser.

The objection that the certificate was not assignable to Amsdell is not available to the appellants. The statute provides for assignment by the holder of a liquor tax certificate to his successor in the business of selling liquors, and further provides "that no such sale, assignment or transfer shall be made except in accordance with the provisions of the Liquor Tax Law." (Laws of 1897, chap. 312, § 18, amending Laws of 1896, chap. 112, § 27.) It does not appear what was the value of the certificate at the time Connolly obtained possession of it, and it is not claimed by the appellants that its value was then in excess of the amount remaining unpaid of the money advanced by Amsdell. In that view, and as the receiver is an officer of the court, he was subject to its lawful direction.

As between the parties the statute has no application to the assignment.

It is unnecessary to inquire whether the public authority from which the certificate was derived could be required to recognize

as effectual the transfer of such a certificate for the purpose that this was made. That question is not considered.

The order should be affirmed.

All concurred.

Order affirmed, without costs.

Fourth Appellate Department, October, 1897. Reported. 21 App. Div. 634.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CHARLES T. WATKINS, Appellant, v. ALANSON B. BISHOP, as Town Clerk of the Town of Warsaw, Respondent.

This is an appeal from an order denying relator's motion for a writ of mandamus compelling defendant as town clerk to call a special town meeting for the purpose of submitting the questions required to be submitted by the provisions of the Liquor Tax Law.

CHARLES D. NEWTON, attorney for appellant: There is no authority in law for use of a ballot machine to vote upon the excise propositions. There was no authority to use the ballot machine for the purpose of voting upon the excise propositions inasmuch as the machine has never been adopted for use at all elections by the Town Board of the Town of Warsaw.

BOTSFORD & ZWETSCH, attorneys for respondent: The Town Board had sufficiently adopted the use of the ballot machine to lawfully use same for purpose of voting upon the excise propositions. Voting by other methods than the ballot is prescribed by law. Art. II., § 5, Constitution of State of New York; People ex rel. Bradshaw v. Bidelman, 26 N. Y. Supp. 954. The courts will not uphold technical objections to make the right of voting insecure and difficult. People ex rel. Hirsh v. Wood, 148 N. Y. 142, 149; Matter of Taylor, 150 N. Y. 242; Matter of Many, 10 App. Div. 451, 453; People ex rel. Goring v. President, &c. 144 N. Y. 616; People ex rel. Bradley v. Shaw, 133 N. Y. 492.

Order affirmed, with costs.

All concurred.

Supreme Court, Monroe Special Term, October, 1897. Reported.
21 Misc. 375.

THE PEOPLE ex rel. JAMES W. BAGLEY, Relator, v. JOHN B.
HAMILTON, Treasurer Monroe County, Respondent.

**Liquor Tax Law—Exemption of “places,” within 200 feet of a church,
used for liquor traffic on March 23, 1896—Temporary suspension of
traffic immaterial.**

The provisions of section 24 of the Liquor Tax Law (chap. 112, Laws of 1896, as amended by chap. 312 of the Laws of 1897), which, after enacting that traffic in liquor shall not be permitted, under the provisions of subdivision 1 of section 11, in any building or other place which shall be in the same street and within 200 feet of a building used exclusively as a church, further provide that “this prohibition shall not apply to a place which, on the twenty-third day of March, eighteen hundred and ninety-six (the day on which the act took effect), was lawfully occupied for a hotel, nor to a place in which such traffic in liquors was actually lawfully carried on at that date,” extend the immunity of the exception to the “place,” irrespective of the person selling liquors there; and, consequently, where it appears that a place, situated within 200 feet of the building used exclusively as a church, was devoted to traffic in liquors on the 23d day of March, 1896, and up to and including the 31st day of July, 1897, an applicant, under the provisions of subdivision 1 of section 11, for a license at the “place,” is entitled thereto, notwithstanding the fact that liquor traffic at the “place” had been temporarily discontinued for five days after the 31st day of July, 1897, at the expiration of which period the applicant sought a liquor tax certificate for the “place.”

WRIT of *certiorari* to review the refusal of the treasurer of the county of Monroe to issue a liquor tax certificate.

Sol Wile, for relator.

Charles E. Bostwick, for respondent.

NASH, J. The application of the relator for a liquor tax certificate was refused by the county treasurer upon the ground that the premises for which a liquor tax certificate is sought are within two hundred feet of a building used exclusively for a church.

Section 24 of the Liquor Tax Law (chapter 112, Laws of 1896, as amended by chapter 312, Laws of 1897) provides, that traffic in liquor shall not be permitted under the provisions of sub-

division 1 of section 11 (the subdivision under which the relator makes his application) in any building or other place which shall be in the same street and within two hundred feet of a building used exclusively as a church; it is further provided that "this prohibition shall not apply to a place which on the 23d day of March, 1896 (the day on which the act took effect), was lawfully occupied for a hotel, nor to a place in which such traffic in liquors was actually lawfully carried on at that date."

It appears that such traffic in liquors was actually carried on at that place for which the certificate is sought on the 23d day of March, 1896, and up to and including the 31st day of July, 1897, and has not since been carried on at that place.

That subsequent to the 31st day of July last, the relator took a lease of the premises or place where such traffic in liquors had been carried on, and on the 4th day of September, 1897, applied to the county treasurer for a certificate, having complied with every requirement of the statute as a condition of the granting thereof.

The refusal is placed upon the ground that the business of trafficking in liquors having been discontinued by the person lawfully carrying it on at the time the Liquor Tax Law took effect, a certificate for the traffic in liquors at that place (it being within two hundred feet of a church) cannot issue.

This brings up the question whether it is the place within which the business is carried on, or the person who is lawfully carrying on the business that is within the exception; plainly the reading of the statute is that it is the *place*; the full text of the provision is that the prohibition shall not apply "to a place which on the 23d day of March, 1897, was lawfully occupied for a hotel, nor to a place in which such traffic in liquors was actually lawfully carried on at that date, nor to a place which at such date was occupied, or was in process of construction by a corporation or association which traffics in liquors solely with the members thereof, nor to a place within such limit to which a corporation or association trafficking in liquors solely with the members thereof at such date may remove."

No other construction than that it is the place which is excepted can be put upon the language in which the legislature has seen fit to frame this exception.

That the legislature intended plainly what the language of the exception imports may be inferred from the fact that in the

act of 1892, regulating the sale of intoxicating liquors (chapter 401, Laws 1892), it was provided, that no person who should not have become licensed prior to the passage of the act, should thereafter be licensed to sell strong or spirituous liquors, in any building not used for hotel purposes, and for which a license did not exist at the time of the passage of the act, which should be on the same street or avenue and within two hundred feet of a building occupied exclusively as a church.

The exception in that act was held by the Court of Appeals to apply to a person who had been licensed to sell at the inhibited place previous to the passage of the act, and whose license was in force when the law was enacted, and not to the place where the business was carried on.

The legislature with the law construed as it had been by the courts before it, has changed the exception from the person holding a license, to the place in which traffic in liquors was lawfully carried on at the date of the passage of the act.

It is contended that if the traffic in liquors is discontinued by the person carrying it on at the time the act took effect, a certificate cannot afterward be granted to another to resume the business at the same place. If this is the construction to be put upon this provision of the law it would be applicable to any suspension of the business however short, and might prevent even a change of proprietorship. The legislature could have prevented all traffic in liquors within two hundred feet of a church, but it has not done that, it has excepted certain properties from the operation of this subdivision of section 24, and the language of the statute should have a reasonable construction. The purpose of the legislature as appears from the context was to protect certain properties from the operation of this prohibition, and it was not made a condition as to any of the other places mentioned that the traffic in liquors should have been actually lawfully carried on when the act took effect. The other places to which the exception applies are "a place lawfully occupied for a hotel, a place which at such date was occupied or in process of construction by a corporation or association which traffics in liquors solely with the members thereof, nor to a place within such limit to which a corporation or association trafficking in liquors solely with the members thereof, at such date may remove." If a place at which as a condition of exemption it is required that the traffic in liquors should have been actually lawfully carried on should

be put to other uses, and the traffic in liquor entirely abandoned it might properly be regarded as a forfeiture of the right to a certificate, but a temporary suspension of the business does not, in my judgment, have that effect.

It follows that the county treasurer should be required to issue the certificate pursuant to the prayer of the petition.

Ordered accordingly.

Supreme Court, Onondaga Special Term, October, 1897. Reported.
21 Misc. 383.

In the Matter of the Application of MACVICKER et al. to Revoke
Liquor Tax Certificate Issued to CLARENCE RILEY.

Liquor Tax Law—Consents—Fraud.

The amendment, made to section 17, subdivision 8 of the Liquor Tax Law of 1896, and providing that "whenever the consent required by this section shall have been obtained and filed as herein provided, unless the same be given for a limited term, no farther or other consent for trafficking in liquors on such premises shall be required so long as such premises shall be continuously occupied for such traffic," has no retroactive force; and where an application is made to revoke a second certificate, upon the ground that the applicant was guilty of fraud in the matter of the consents thereto, he can not successfully resist the application by claiming that, under the amended statute, the consents which he obtained for the first certificate inure to the benefit of the second certificate and make consents to that certificate unnecessary.

PROCEEDING to revoke and cancel a liquor tax certificate issued by the treasurer of Lewis county.

Walter Ballou, for application.

C. S. Mereness, opposed.

HISCOCK, J. This is a proceeding to revoke and cancel a liquor tax certificate issued by the treasurer of Lewis county on or about May 15, 1897, to one Clarence Riley.

The certificate was issued under subdivision 1, section 11 of the Liquor Tax Law. The proceeding to cancel the certificate is pursuant to subdivision 2, section 28 of said law and proceeds upon the theory that material representations contained in the

application in respect to consents of owners of buildings occupied as dwellings within two hundred feet of the location of the place where the traffic in liquor was to be carried on, are false.

In October, 1896, said Riley procured a liquor tax certificate to keep a saloon at the premises mentioned in the application for the present certificate and carried on business thereunder until the one now in question was issued on or about May 15, 1897. At the time when he procured his first certificate there were four buildings used exclusively as residences within the prescribed limit of two hundred feet from the nearest entrance to the building where he proposed to carry on his business and Riley obtained the necessary consents. This number of buildings continued without change until just before the date when he made application for the last certificate. He was unable to obtain from the owners of these buildings the requisite number of consents for his second certificate and thereupon five structures were drawn and placed upon a piece of land within the prescribed distance, from the owner or owners of which consents were obtained and used upon the application for the last certificate. These structures were built somewhere else and drawn upon the land in question. They had no foundations and were of a most temporary and unsubstantial character. Riley in various ways, directly and indirectly, was a party to bringing and placing them upon the land and filling them with occupants. It is claimed by the applicants that they were not "buildings occupied exclusively for a dwelling," within the meaning of the statute, but that they were sham buildings constructed and placed there for the purpose of producing necessary consents and really to avoid the provisions of the statute. Without, perhaps, admitting all that is claimed by the applicants upon this question, it still was not at all seriously claimed by counsel for Riley upon the argument that the consents from and in behalf of said buildings should be legally counted or considered for the purpose of sustaining the certificate.

The written application made by Riley for his certificate treated and represented these buildings as buildings occupied for dwellings within the meaning of the statute, and in accordance with the provisions of law he filed simultaneously with his application a consent covering them. It is claimed by the applicants, and again (except for the reason hereinafter considered) not

controverted by Riley, that the application and purported consents filed therewith constituted, under the various provisions of the Liquor Tax Law, a false statement, for which the certificate may be, in these proceedings, canceled and revoked.

The reason above referred to and now urged why such law and penalty is not applicable to this case is as follows: Riley, as above stated, in 1896 obtained the necessary consents to have issued to him his first certificate, and it is to be assumed that those consents were in the ordinary legal form. Intermediate that time and the date of his application for the second certificate subdivision 8, section 17 of the Liquor Tax Law covering this subject had been amended by adding the provisions (Laws 1897, chapter 312): "Whenever the consent required by this section shall have been obtained and filed as herein provided, unless the same be given for a limited term, no further or other consent for trafficking in liquor on such premises shall be required so long as such premises shall be continuously occupied for such traffic." It is urged that this provision just quoted exempted Riley from the necessity of obtaining any consents upon his last application, and that, therefore, although he did attempt to obtain them, and did base an application on them, still if they were unnecessary and he was entitled to a certificate without them, he should not be charged with any offense in respect to them, or his certificate canceled for the reasons hereinbefore set forth. This contention seems to me to involve mainly the question whether the amendment above quoted was retroactive and covered consents obtained before it was passed. If it was and did so do, then the defendant's argument would seem to be well founded, but I do not believe such to be the case. While it rested entirely with the legislature to give or not to give the inhabitants of surrounding dwellings a voice in deciding whether a liquor tax certificate should be issued, and while very likely the giving to them of such voice would not grant a vested right which could not be taken away even by retroactive law, if the legislature saw fit, still the legislature having included this feature in the general law, it should not be held to be taken away certainly by retrospective law unless such intention clearly appeared. Prior to the passage of this amendment and at the time the first consents were obtained there was nothing in the statute with reference to consents "for a limited term," or to indicate that a person giving a consent to the issuing of one certificate was to be bound thereby

for all future time. It is true, as urged by the counsel for the defendant, that a law which compelled a person desiring to engage in this traffic, and having obtained his certificate, and having erected, perhaps, an expensive building, to take the risk of not being able to obtain consents for another certificate the succeeding year might result in hardship. But this seems to have been the law when the defendant obtained his first certificate, and it would now be somewhat severe in the opposite direction to so bind by the provisions of a retroactive statute those persons who gave their consents for a short time as to make the latter permanent and continuing.

The provisions of a statute are not to be treated as retrospective unless the intention to have them so is clearly indicated, and this applies as well to an amendment of as to an original statute. *McMaster v. State*, 103 N. Y. 547, 554; *Matter of Miller*, 110 id. 216; *Ely v. Holton*, 15 id. 595.

The application, therefore, is granted.

Application granted.

Supreme Court, Kings Special Term, October, 1897. Reported. 21 Misc. 504.

In the Matter of the Application of RULAND.

1. Liquor Tax Law—Consents—Dwellings occupied exclusively as such.

The provisions of section 17 of the Liquor Tax Law, requiring an applicant for a license to procure the consent of the owners of "at least two-thirds" of the "building or buildings occupied exclusively for a dwelling" within a 200-foot limit of the proposed saloon, include, in making an estimate of the number of consents required, vacant dwellings designed exclusively for occupation as dwelling-houses and also a house where a dressmaker, displaying no sign, does sewing; but exclude a building used mainly as a grocery store.

2. Same—Measurement of 200-foot limit.

The statutory direction that the 200-foot limit shall be determined by measurement, "in a straight line," between those entrances of the saloon building and of the dwelling which are nearest together, means the length of a straight line, running from one entrance to another, regardless of the intervening obstructions.

APPLICATION by a citizen for the revocation of a liquor tax certificate, pursuant to section 28 of the Liquor Tax Law, on the

ground that it was falsely stated in the application that the owners of two-thirds of the dwellings, within two hundred feet, had consented.

C. A. Haviland, for petitioner.

J. W. Ridgway, opposed.

GAYNOR, J. There were at the time of the application for the liquor tax certificate twenty-one buildings ordinarily occupied exclusively for dwellings, within the two hundred feet limit. This leaves out 288 Greene avenue, which is the entrance to the rear of the building 378 Classon avenue, mainly used as a grocery store. It includes 386 Classon avenue, which is a boarding-house. Two of said dwellings, viz., 401 and 370 Classon avenue, were vacant at the time of such application. The tenant of 303 Greene avenue is a dressmaker by trade, and does more or less sewing in the house, but has no sign out. This does not make it partly used for business. A mechanic may do work in his dwelling for others without making it no longer exclusively a dwelling. The statute requires the applicant to get the consent of the owners of "at least two-thirds" of the "building or buildings occupied exclusively for a dwelling" within the two hundred feet limit. I construe this to include buildings constructed and meant for such exclusive occupation as dwellings. In the case of a new street or block of dwellings not yet let, I do not think the owners of such dwellings may be ignored by an applicant for a liquor tax certificate. That might enable such a certificate to be obtained without any such consent. I therefore include the vacant dwellings.

The applicant obtained the consent of the owners of thirteen of the said twenty-one dwellings, and thus falls short of two-thirds. The grocery-store building has to be omitted.

The statute requires the two hundred feet limit to be determined by measurement "in a straight line" between the entrances of the saloon building and the dwelling which are nearest together. Measurements along the ground to the foot of the stoop, and then at an angle up the stoop to the front door, would in the case of two dwellings put them outside the two hundred feet limit. I do not think such a measurement is in a straight line within the meaning of the statute. I think the

actual length of a straight line stretched from one entrance to the other, regarded as running through all obstructions in the course, is the measurement required. The application has to be granted.

Application granted.

Supreme Court, Saratoga Special Term. Reported. 48 N. Y. Supp. 1035.

HENRY H. LYMAN v. JOHN MC GRIEVEY.

Nussbaum & Coughlin, for plaintiff.

Thomas O'Connor, J. W. Atkinson (J. W. Houghton of counsel) for defendant.

McLAUGHLIN, J. The plaintiff is not entitled to maintain this action unless the population of the village of Waterford is shown by either the last State or Federal census. It is conceded that it is not shown by the former, but it is urged that it can be determined from the latter. Does the last United States census show the population of this village? The answer to this inquiry must be determined from the census and that alone. It cannot be determined from anything else; and resort cannot be had to other evidence for the purpose of determining it. This was the view taken and the construction given to the statute under consideration by this court in the case of *People ex rel. Cramer v. Medbury*, 17 Misc. Rep. 8. The printed compendium of the United States Census as sent out by the United States government does not show it. And, without now passing upon the question whether resort can be had to the schedules of records made by the enumerators for the purpose of showing that the printed compendium or official record is incorrect, I do, for the purpose of this case, consider these schedules, and have reached the conclusion that the population of this village is not thus shown. The returns of the enumerators offered in evidence is of the town of Waterford and not of the village of Waterford. They do not purport to be an enumeration of the village, and can only be considered such in the sense that the greater includes the less. The population of this village at the time the last Federal census

was taken cannot be determined from the schedules. It can only be determined, if at all, by using them in connection with other evidence, and this the statute does not permit. The method provided for determining the population of a given city or village under chapter 112 of the Laws of 1896 is a fixed and arbitrary one. The legal intent in thus fixing it is manifest; it is not only to regulate the traffic in liquors, but also to provide, with as little expense as possible, a revenue for the State. Hence, the provision that the tax to be paid by a city or village shall be determined by the population as shown by the last State census; or, if not thus shown, then by the last Federal census; and, if not shown by either, then the amount fixed by the statute itself.

The plaintiff, however, contends that the population of this village is established by the certificate of Donnell (Plaintiff's Exhibit 2). This official certifies that the paper attached to the certificate "is a statement as nearly correct as can be ascertained from the population schedules." But the population schedules, so far as the same relate to the village of Waterford, were put in evidence; and whether or not such schedules show the population of that village, must be determined by the court and not by the conclusion of any witness or official. It has always been held that the construction of an instrument when the instrument itself is put in evidence, is for the court. (*United States v. Ames*, 99 U. S. 45; *Bonnell v. Griswold*, 68 N. Y. 294; *Buffalo Catholic Institute v. Bitter*, 87 N. Y. 250; *Bogardus v. New York Life Ins. Co.*, 101 N. Y. 328.) Authorities to this effect are numerous and decisive. Therefore, when this piece of evidence is construed in connection with the schedules upon which it purports to be based, it at once becomes apparent that nothing is added to or taken from the schedules. Indeed, the certificate throws no light whatever upon the real matter under consideration.

The defendant insists that the certificate of Donnell (Plaintiff's Exhibit 2) cannot be considered as evidence. The admission of this certificate as evidence was objected to by defendant, and at the close of the trial a motion was made to strike it out, and, by consent of counsel, the disposition to be made of the motion was reserved until this time. I think defendant's motion should be granted. Section 944 of the Code of Civil Procedure provides: "A copy of a record or other paper remaining in a department of the government of the United States is evidence when certified by the head, or acting chief officer, for the time being, of that depart-

ment; or when certified by the officer in whose charge it is, pursuant to a statute of the United States, or otherwise in accordance with a statute of the United States relating to certifying the same * * *." This exhibit is not a copy of any record or other document remaining on file in any department of the United States. It is simply an attempt on the part of an official to give his conclusions as to what a record on file contains. Under the statute referred to an officer can certify to the correctness of a copy of a record on file, but the court must determine what the record contains and what its legal effect is. For these reasons I strike out this exhibit and give the plaintiff an exception; and, with this evidence stricken out, there is nothing whatever to show what the population of the village of Waterford is. The conclusion thus reached renders it unnecessary to pass upon the other question presented.

It follows that the complaint must be dismissed.

Supreme Court, New York Special Term, October, 1897. Unreported.

In the Matter of the Petition of CAROLINE A. LIVINGSTON to
Revoke a Liquor Tax Certificate of JOHN SHADY.

RUSSELL, J. The evidence justifies the claim of the petitioner that the applicant for the liquor tax certificate did not file a consent that traffic in liquor be carried on in his premises signed by two-thirds of the owners of the buildings occupied exclusively for dwellings, the nearest entrance to which was within two hundred feet measured in a straight line, to the nearest entrance of the premises where the liquor traffic was to be carried on. Nor is the tax certificate of that character of property which required a trial by jury before it can be rescinded. The certificate is created by force of a law which regulates its issuance, and is subject to the provisions of that law as to its validity and cancellation. The applicant takes it with all its privileges, but subject to all the burdens of the law.

Motion granted with costs.

Supreme Court, Suffolk Special Term, November, 1897. Unreported.

EDWARD GING *v.* JOHN SHERRY, as Treasurer of Suffolk County.

MADDOX, J. Plaintiff to obtain a liquor tax certificate to traffic in liquors in the village of Greenport, on or about May 1, 1896, paid to defendant's predecessor in office a tax of \$200, when by the terms of the "Liquor Tax Law" the tax therefor was but \$100. The certificate issued recited the payment of \$200 "for excise tax." About July 10, 1896, plaintiff made demand upon defendant's predecessor for the return to him of such excess payment of \$100, and about March 5, 1897, delivered to defendant such liquor tax certificate and received from defendant a certificate of the same grade, covering the same period, and for the same place, reciting the payment of \$100 "for excise tax"; and also received what was known as a "duplicate surrender receipt" for \$100, payment of which has been demanded of defendant and refused.

Defendant contends that the delivery of the certificate was a surrender thereof for cancellation as contemplated by section 25 of the "Liquor Tax Law" and that the payment of such excess sum of \$100 must be in the manner provided by that section as amended by chapter 312 of the Laws of 1897.

To this view I cannot assent since plaintiff did not "voluntarily cease to traffic in liquors during the term for which such tax was paid," nor did he seek a "refund of the *pro rata* amount of the tax paid for the unexpired term of such tax certificate." Quite on the contrary, for he continued such traffic; what he sought was the repayment of the sum wrongfully exacted from him upon his application for the certificate necessary that he might do business under the terms of that act, and the certificate was surrendered to the end that his claim might be adjusted.

It is true that by section 13 of the "Liquor Tax Law" the taxes shall be apportioned and paid by the collecting officers "within ten days from the receipt thereof" to the proper fiscal officers; but that section, in my opinion, has no application here as the excess payment of \$100 was no part of the tax required by the act and the plaintiff has not asked repayment of any part, as a refund or otherwise, of such tax as fixed by subdivision 1 of section 11 of the act.

The action was, in my judgment, properly brought and is plaintiff's only remedy.

Judgment for plaintiff with costs.

Supreme Court, New York Special Term, November, 1897. Unreported.

In the Matter of the Petition of GEORGE HILLIARD as Special Deputy Comr. of Excise, to Enjoin ANNIE GIESE from Trafficking in Liquors.

LAWRENCE, J. It was long ago held by the Court of Appeals that licenses to sell liquors are not contracts between the State and the licensee, giving the latter vested rights, protected on general principles, or by the Constitution of the United States, but that such licenses are mere temporary permits to do what otherwise would be unlawful, and are not property in any legal or constitutional sense (*Metropolitan Board of Excise v. Barrie*, 34 N. Y., page 67.) It, therefore, follows that, notwithstanding the payment of the license fee by the defendants in these cases and the reception of licenses thereunder before April 20, 1897, it was within the power of the legislature to pass the act, chapter 312 of the Laws of 1897, amending chapter 112 of the Laws of 1896, authorizing a special enumeration of the inhabitants of territory annexed to a city for the purpose of determining the amount of the excise tax to be paid by one engaged in the business of selling liquors. The affidavits before me bring these cases within the provisions of the statute. They show that the special enumeration of inhabitants contemplated by the statute has been made and thereunder the annual license fee which the defendants are called upon to pay has been increased to the sum of \$350. By section 29 of the act of 1896, as amended by chapter 312 of the Laws of 1897, an injunction may be granted by this court against any corporation, association, copartnership or person who shall unlawfully traffic in liquors without obtaining a liquor tax certificate, as provided by this act, or shall traffic in liquors contrary to any provision of this act. Until the defendants have paid the license fee prescribed by law they are trafficking in liquors contrary to the provisions of this act. On the argument

something was said about the hardship of these cases. With that consideration I have, of course, nothing to do. The statute is one which the legislature, as has been frequently determined, was competent to pass, and the court must obey its directions. Whether, under section 25 of the Act of 1896, as amended in 1897, if the defendants do not desire to continue business they would not be entitled to surrender their licenses, and receive back the whole or a portion of the money paid by them before the passage of the latter act, for their certificates, is a question which does not necessarily arise on these motions.

Motions granted, but without costs.

First Appellate Department, November, 1897. Reported. 22 App. Div. 77.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* PATRICK CROTTY, Appellant.

Liquor Tax Law—An indictment under, for selling liquor on Sunday—

It need not negative exceptions in favor of a pharmacist or physician.

An indictment for a violation of the Liquor Tax Law (Laws of 1896, chap. 112, § 31), which forbids the sale of liquors on Sunday by any corporation or person, need not negative the two exceptions contained in a subsequent clause of that section in favor of pharmacists and hotelkeepers. Van Brunt, P. J. dissented.

APPEAL by the defendant, Patrick Crotty, from a judgment of the Court of General Sessions of the Peace in and for the city and county of New York, rendered on the 18th day of February, 1897, convicting him of selling liquor on Sunday.

Stephen J. O'Hare, for the appellant.

John D. Lindsay, Assistant District-Attorney, for the respondent.

INGRAHAM, J. The defendant was indicted for a violation of section 31 of chapter 112 of the Laws of 1896, the Liquor Tax Law. By that section it is provided that "It shall not be lawful

for any corporation, association, copartnership or person, whether having paid such tax or not, to sell, offer or expose for sale, or give away any liquor, on Sunday, or before five o'clock A. M. on Monday." The indictment charged the defendant with having unlawfully sold to one Harvey D. Corey and to certain other persons whose names are unknown, liquor on the 13th day of August, 1896, the same being Sunday.

There was no demurrer to the indictment, nor did the defendant ask the court to advise the jury to acquit; but, after the conviction, the defendant moved for an arrest of judgment on the ground that the facts stated in the indictment did not constitute a crime. It is now claimed that this motion in arrest of judgment should have been granted; as, to constitute a crime, the facts stated in the indictment should have negatived the two exceptions contained in the section of the statute before referred to. The section contains the following provision after the provision before referred to: "But the provisions of clauses 'a,' 'b,' 'c' and 'd' of this section are subject to two exceptions, as follows." The first of these exceptions relates to a pharmacist, who may sell liquor upon the prescription of a physician; and the second to a holder of a liquor tax certificate who is keeper of a hotel, and who may sell liquor to the guests of the hotel with their meals, or in their rooms or apartments, but not in the barrooms or other similar rooms of the hotel.

Assuming that this objection to the indictment could be raised upon a motion in arrest of judgment, we do not think that the objection is well taken. The statute expressly provides that it shall not be lawful for any corporation, etc., to sell, offer or expose for sale, or give away, any liquor on Sunday, and at various other times and places subsequently specified in the section. These provisions are general. They apply to all persons, whether they have paid a tax or not, and the exceptions relate only to persons engaged in two particular occupations — a pharmacist and a hotel-keeper.

The rule is stated in the case of *Jefferson v. The People* (101 N. Y. 21) as follows: "It is no doubt a general rule that if a statute forbids the doing of any act, without the authority of either one of two things, the indictment must negative the existence of both before it can be supported, and it is well settled that, if exceptions are stated in the enacting clause, it would be necessary to negative them in order that the description of the crime may

correspond with the statute; but if there be an exception in a subsequent clause or subsequent statute, that is matter of defense and is to be shown by the defendant." Applying this rule, it is clear that the exception is not stated in the enacting clause. This clause makes it unlawful to sell, offer or expose for sale, or give away, any liquor on Sunday. The exception is contained in a subsequent clause, which allows persons engaged in the business of a pharmacist, or of hotel-keeper, under certain conditions, to sell liquor on Sunday. If the defendant sold the liquor, for the selling of which he was indicted, within either of the exceptions, it was a matter of defense, and was to be shown by him. (See also, *Fleming v. The People*, 27 N. Y. 329.)

The other exceptions taken by the defendant do not require notice. There was no exception to any particular portion of the charge, and the general exception taken by the defendant presents no question for review.

We do not think the charge of the learned trial judge deprived the jury of the exclusive right to judge of and decide the questions of fact, nor do we think that there was any error upon the trial which requires us to reverse the judgment.

The claim of the defendant, that the statute imposes an excessive fine upon conviction, is clearly untenable.

The judgment appealed from should be affirmed.

RUMSEY, PATTERSON and O'BRIEN, JJ., concurred; VAN BRUNT, P. J., dissented.

VAN BRUNT, P. J. (dissenting) :

I dissent. The charge is in direct conflict with the rule laid down in the case of *McKenna v. The People* (81 N. Y. 360).

Judgment affirmed.

First Appellate Department, December, 1897. Reported. 24 App. Div. 51.

In the Matter of the Petition of CAROLINE A. LIVINGSTON, Respondent, to Revoke and Cancel the Liquor Tax Certificate Issued to JOHN SHADY, Appellant.

A liquor tax certificate is property—The holder is not entitled to a jury trial on an application for its cancellation.

A certificate, issued under the Liquor Tax Law (Laws of 1896, chap. 112, as amended by chap. 312, Laws of 1897), is made property by the Tax Law, which may also provide for its cancellation without giving the holder a trial by jury of the questions presented on the application therefor.

APPEAL by John Shady from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of October, 1897, revoking and canceling a liquor tax certificate issued to the said John Shady.

James A. Dunn, for the appellant.

Robert A. B. Dayton, for the respondent.

WILLIAMS, J. The proceeding was instituted by a citizen residing within two hundred (200) feet of the premises licensed, under subdivision 2, section 28 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312), to revoke the certificate, on the ground that the applicant did not file with the application for the license the consent that traffic in liquor be carried on in the premises signed by two-thirds of the owners of buildings occupied exclusively for dwellings within two hundred feet of the place licensed, as required by subdivision 8, section 17 of the Liquor Tax Law.

The application stated that there were but three owners of such buildings, and the applicant filed the consent of two of the three. The evidence given in this proceeding showed beyond question that this statement in the application was untrue, and that the consent of two-thirds of such owners was not filed with the application, and the court very properly made this order revoking the license for that reason.

It is said, however, that, before the applicant could be deprived

of his certificate, he was entitled to have a trial by jury under the Constitution; that the certificate was property, and he could not be deprived of such property without due process of law. We have held that these certificates are property. (*People v. Durante*, 19 App. Div. 292.) They were made such by virtue of the provisions of the Liquor Tax Law, but the legislature, which gave the certificate the character of property, had power to and did by the same act provide both for their issuance and cancellation, and under what circumstances they should be valid, and when and how they might be revoked. The character given them as property was subject to all these provisions attached to them when they were created. Applicants take them with all the privileges and subject to all the burdens imposed upon them by the Liquor Tax Law.

The order appealed from should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and INGRAHAM, JJ., concurred.

Order affirmed, with costs.

Fourth Appellate Department, December, 1897. Reported. 24 App. Div. 233.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. WILLIAM H. HUFFMAN, Appellant.

Indictment under the Liquor Tax Law—Allegations as to different sales—

Where an indictment charges an illegal sale to two persons jointly, proof of a separate sale to each one of them is improper.

An indictment, drawn under the Liquor Tax Law (Laws of 1896, chap. 112, § 11), which charges that, on or about the 26th day of March, 1896, the accused sold and delivered liquor in quantities less than five gallons to two persons named, as well as to divers other persons unknown, without having complied with the law relative to the payment of the tax and the posting of a liquor tax certificate, is not demurrable as charging more than one crime.

The Liquor Tax Law (Laws of 1896, chap. 112, § 33) provides that "each violation of any of the provisions of this act shall be construed to constitute a separate and complete offense," and under an indictment charging a sale to two persons jointly, two independent sales, one to each of such parties, can not be proved.

APPEAL by the defendant, William H. Huffman, from a judgment of conviction of the County Court of Allegany county, entered in the office of the clerk of the county of Allegany on the 18th day of December, 1896, convicting him of the crime of violating the Excise Law, and also from an order entered in said clerk's office on the 18th day of December, 1896, denying the defendant's motion for a new trial made upon the minutes.

A grand jury of Allegany county, on the 12th of June, 1896, presented an indictment against the defendant charging him with the "crime of selling liquor in quantities less than five gallons at a time, without having paid a tax, as provided by section 11 of chapter 112 of the Laws of 1896, and obtained and posted a liquor tax certificate as provided by the said statute, which crime is thus defined by sections 31 and 34 of the said statute, and was committed, as follows: The said Wm. H. Huffman did, on or about the 26th day of March, 1896, at the town of Friendship, in the county of Allegany aforesaid, wilfully * * * sell, and cause, suffer and permit to be sold, liquor in quantities less than five gallons at a time, to James Whalen and C. H. Robinson, and to divers other persons and to divers persons to the jury aforesaid unknown, and did then and there unlawfully deliver and cause to be delivered in pursuance of such sale to the said James Whalen and C. A. Robinson, and to said divers other persons and to said divers persons to the jury aforesaid unknown, liquor, to wit, one pint distilled spirits, * * * without having paid a tax therefor, and obtained and posted a liquor tax certificate as required by the provisions of chapter 112 of the Laws of 1896, contrary to the form of the statute. * * * "

The defendant interposed a demurrer to the indictment on two grounds: "*First.* The indictment charges more than one crime, contrary to section 278 of the Criminal Code, to wit, it alleges the sale of liquor to one James Whalen and to one C. H. Robinson, *Second.* That the indictment does not conform to the requirements of sections 275 and 276 of the Criminal Code." The demurrer was overruled, and the defendant pleaded not guilty, and a trial was had on the 5th of December, 1896, in the County Court of Allegany county.

Fuller & Rice, for the appellant.

Charles H. Brown, District Attorney, for the respondent.

HARDIN, P. J.: It is provided in section 275 of the Code of Criminal Procedure that the indictment must contain "a plain and concise statement of the act constituting the crime without unnecessary repetition."

In section 278 of the Code of Criminal Procedure it is provided, viz.: "The indictment must charge but one crime and in one form, except as in the next section provided."

Section 279 of the Code of Criminal Procedure provides, viz.: "The crime may be charged in separate counts to have been committed *in a different manner* or by different means; and where the acts complained of may constitute different crimes, such crimes may be charged in separate counts."

These sections have lately been construed by the Court of Appeals in *People v. Wilson*, 151 N. Y. 403. In the case cited it has been held that the effect of the provision of section 279 of the Code of Criminal Procedure, that " 'where the acts complained of may constitute different crimes, such crimes may be charged in separate counts,' constituting an exception to the provision of section 278 that 'the indictment must charge but one crime,' is to permit a continuance of the former practice of joining different crimes by separate counts when they all relate to the same transaction."

"The act" constituting the crime alleged in the indictment against the defendant is that he "did, on or about the 26th day of March, 1896, * * * sell, and cause, suffer and permit to be sold, liquor in quantities less than five gallons, * * * and did, then and there, unlawfully deliver and cause to be delivered, in pursuance of such sale, to the said James Whalen and C. A. Robinson, and to said divers other persons, and to said divers persons to the jury aforesaid unknown, liquor, to wit, one pint distilled spirits (and other enumerated kinds of liquor) without having paid a tax therefor, and obtained and posted a liquor tax certificate as required by the provisions of chapter 112 of the Laws of 1896."

In *People v. Adams* (17 Wend. 475) it was held, viz.: "In an indictment for *selling spirituous liquors without license* it is not necessary to specify the names of the persons to whom the sales were made. A count in such an indictment charging the sale of divers quantities of different sorts of liquors to divers citizens of the State, and to divers persons unknown, can not be objected to on error as a count embracing *more than one offence*; the whole

will be deemed a single transaction. The public prosecutor, however, on such a count may, on the trial, be confined to the proof of a single offence. An indictment charging an offence on a particular day, and also *on divers other days*, is good; a *day certain* being alleged, the residue will be rejected as surplusage."

In the indictment before us only one day is mentioned, to wit, the 26th of March, 1896.

In the course of the opinion delivered in *People v. Adams* (*supra*) NELSON, Ch. J., said: "It is to be remarked that the offense upon the statute consists in the *act of selling* the spirituous liquors without the license, and, therefore, the designation of the persons to whom sold is in no way material to constitute it. The question is simply one of pleading whether certainty to a common intent requires the names of the persons to be given to whom the liquor was sold."

Although the indictment in that case averred that the defendant sold by retail "to divers citizens of this State, and to divers persons to the jurors aforesaid unknown, and did deliver, in pursuance of such sale, to the said divers citizens, and the said divers persons to the jurors aforesaid unknown, strong and spirituous liquors," to be drank in the house of John Adams at the city of Utica, the learned judge in that case observed that the claim that the count contained more than one offense could not be sustained, and he adds: "Upon our view of the time when the offence is laid in the indictment, that is, upon the day given, but one sale by retail is to be deemed charged in the count; the three gills of brandy, three gills of rum, etc., are to be viewed as having been sold at one and the same time, and as constituting but one transaction. * * * If we strike out the words 'divers days and times,' etc., as we have seen may be done, or, in other words, as the defendant may require the prosecutor to confine his proof on the trial the same as if they were expunged, then but one offence is charged in the count, and the conviction can not, of course, extend beyond it; a single sale of the quantity of liquor mentioned, to divers citizens of the State, and to divers persons unknown," etc. That case was referred to with approval in *Osgood v. The People* (39 N. Y. 451), which latter case was decided in 1868, before the passage of the Code of Criminal Procedure.

The indictment is quite unlike the one under consideration in *People v. O'Donnell* (46 Hun, 360). In that case the indictment alleged sales on four different days, naming them.

We are of the opinion that no error was committed in overruling the demurrer to the indictment.

(2) Upon the trial, the People called as a witness James Whalen, who testified that he went into the defendant's hotel on the 26th of March, 1896, and that the bartender was behind the bar, in the barroom, at the time. The witness adds: "I told him I wanted a half pint of whiskey. He passed it right out, and I paid him twenty-five cents. * * * That was the first I was in that house that day. I had two half pints. That was about two o'clock; the other time, about half-past three the same day, I again went into the hotel. I went to the barroom. I saw the same person behind the bar. I got a half pint of whiskey. * * * I took it and put it in my pocket. I got it of Mr. Coleman (the bartender), and paid twenty-five cents for it." In the course of his cross-examination the witness stated that he was acquainted with C. H. Robinson, and he adds: "I did not see him the day I got the whiskey. He had nothing to do with the purchase of that whiskey."

It appears by the evidence that Archie Worden participated in drinking the whiskey that was purchased by Whalen, and that he was placed in the lockup, and that certain proceedings were instituted before one W. H. Scott, a justice of the peace, on the day after the alleged sale of the whiskey, or the day thereafter, and an affidavit was made before the justice by Whalen which was received in evidence, without objection, before the trial closed, and in that affidavit Whalen says, viz.: "On the 26th day of March, 1896, I went into the said hotel, to wit, The American House, at the town and village of Friendship, Allegany county, and then and there bought of the bartender, in the said house, two one-half pint bottles of whiskey. I know it was whiskey, as I drank a large portion of it myself. I was somewhat intoxicated at the time I got this whiskey. I bought it of a man behind the bar in said hotel, whose name I do not know, but he was a short, thick-set man. I paid twenty-five cents for each half pint I got there."

The testimony of Whalen, coupled with the affidavit, which was received without objection, clearly established, if credited, a violation of the statute, and that it occurred on the 26th day of March, 1896, as alleged in the indictment.

In section 31 of chapter 112 of the Laws of 1896 it is provided: "It shall not be lawful for any corporation * * * or person,

which, or who, has not paid a tax, as provided in section eleven of this act, and obtained and posted the liquor tax certificate, as provided in this act, to sell, offer or expose for sale, or give away liquors in any quantity less than five wine gallons at a time; nor, without having paid such tax and complied with the provisions of this act, to sell, offer or expose for sale, or give away liquor in any quantity whatever, any part of which is to be drunk on the premises of such vendor. * * *

In section 33 of that act it is provided that any person engaged in the traffic of liquors "shall, upon conviction of a violation of any of the provisions of this act, be liable for and suffer the penalties imposed therein; * * * and each violation of any of the provisions of this act shall be construed to constitute a separate and complete offense; and for each violation on the same day, or on different days, the person or persons offending shall be liable to the penalties and forfeitures imposed by this act."

The evidence given as to the purchase made by Whalen, if credited, was sufficient "to constitute a separate and complete offense," as declared in the language of the statute which has just been quoted.

The People put upon the stand C. H. Robinson as a witness, who testified that in the latter part of March he had occasion to go to this hotel, and he was then asked: "Q. Did you have anything to drink there?" The defendant objected to the question on the ground that it was "incompetent and seeks to prove another and distinct crime from the one already sought to be proved." The witness then added: "I cannot tell you what day it was. Have not very much recollection of the time. Have no means of telling when it was. I was sworn before Mr. Scott." Thereupon the following question was propounded to him: "Q. Did you, in that affidavit, state when it was you had something to drink in that hotel?" This was objected to again on the ground that it was incompetent, immaterial and irrelevant. The objections were overruled and the defendant took an exception. The witness answered: "I think the affidavit would refresh my mind as to what I did say." Thereupon the district attorney put in the hands of the witness a paper and asked him to read it, and then propounded to the witness the following question: "Q. Can you state to the jury when it was you had anything to drink in Huffman's Hotel the latter part of

March?" This was objected to by the defendant as "incompetent. 2d. Seeks to prove a separate and distinct crime from the one already sought to be proved. 3d. Inadmissible under the indictment." The objections were overruled and the defendant took an exception. The witness answered: "Some time in March. It was previous to the prosecution, but can not tell how long before. I guess I did swear how long it was. I guess I can tell what I swore to. It says so in that affidavit. The affidavit was made on the 28th day of March." The following question was then propounded to him: "Q. What was it you did on the occasion referred to?" The defendant objected to the question on the ground that it was "immaterial, irrelevant, seeking to prove a distinct crime from the one already sought to be proved. Inadmissible under the indictment." The objections were overruled and an exception taken. The witness answered: "I drank at the bar there; drank beer; and I drank whiskey there. I bought the whiskey of this young man Coleman. I bought one drink of him and I guess I paid ten cents. Paid it to Coleman. I was in the habit of going in and out of there sometimes three or four times a day."

The language used in the indictment would warrant the construction apparently given to it by the county judge that the averment was that the sale was to Whalen and Robinson jointly, which was doubtless the view taken by the county judge in order to overcome the objections made by the defendant to the indictment. (*People v. Harmon*, 49 Hun, 558; S. C. affd., 112 N. Y. 666.)

The People, however, in producing evidence, gave testimony to the effect of the independent sale made to Whalen of the whiskey on two different occasions (there being no objection to the second occasion), and when the attempt was made by the evidence of Robinson to prove another violation, it was apparently to prove a violation not specifically mentioned in the indictment.

As we have seen, the statute provides that each violation shall be a complete offense. If the evidence which was offered and received from the witness Robinson is received and considered, then the People are in the attitude of proving an additional offense to the one alleged in the indictment.

The refusal of the defendant's counsel to concede that the People had proved one offense by the testimony of Whalen, does not seem to be an adequate excuse for allowing evidence from Robinson of a distinct, separate, independent violation of the law.

Section 33 of chapter 112 of the Laws of 1896, provides that "each violation on the same day, or on different days," shall subject the person offending "to the penalties and forfeitures imposed by this act." If the evidence of Robinson was competent, then we have an anomalous situation of an indictment alleging a sale to Whalen and Robinson as a sale to them jointly; proof of sale to Whalen under that indictment and then proof of sale on another occasion to Robinson in the absence of Whalen.

As already stated, section 275 of the Code of Criminal Procedure prescribes that the indictment shall contain "a plain and concise statement of the act constituting the crime." It will hardly do to allege an act in violation of law by a sale to two persons jointly, and to prove the sale to one independent of the other, and having given such proof of the act constituting the crime, to prove another additional act; especially under a statute which declares that each and every violation of any of its provisions "shall be construed to constitute a separate and complete offense" and subject the party accused of a violation "for each violation on the same day, or on different days," to a penalty. (*People v. Krank*, 110 N. Y. 488; *People v. Charbineau*, 115 id. 433, which was commented upon in *People v. Wilson*, 151 id. 409.)

If the foregoing views prevail, it will lead to a reversal of the judgment and order and a new trial.

All concurred.

Judgment upon the verdict and order denying a new trial reversed and a new trial directed in the County Court of Allegany county, to which county, after entry of judgment in pursuance of section 547, etc., of the Code of Criminal Procedure, the proceedings are remitted.

Fourth Appellate Department, December, 1897. Reported. 24 App. Div. 309.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CHARLES BEDELL,
Respondent, v. JOHN F. KINNEY, Sheriff of Niagara County,
Appellant.

Writ of habeas corpus—Premature, if granted to review a sentence, the imprisonment under a valid requirement of which has not expired.

A person who is imprisoned under a sentence for a violation of the Liquor Tax Law, legal so far as it requires his imprisonment for six months, and illegal so far as it requires his continued imprisonment for a certain period after the expiration of the six months, is not entitled until the six months have expired to a writ of habeas corpus to inquire into the cause of his imprisonment.

WARD, J., dissented.

APPEAL by the defendant, John F. Kinney, sheriff of Niagara county, from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Niagara on the 7th day of May, 1897, upon the return to a writ of habeas corpus, directing that the relator be discharged from imprisonment on the 23d day of July, 1897.

Further facts are stated in the dissenting opinion.

Abner T. Hopkins, District-Attorney, for the appellant.

The respondent not appearing personally or by counsel.

FOLLETT, J.:

The relator was sentenced January 23, 1897; the habeas was issued April 19, 1897; and May 7, 1897, the order appealed from was granted and entered, which directed that the relator be discharged July 23, 1897. It is conceded that the part of the judgment adjudging that the relator be imprisoned for six months is legal and regular. The writ of habeas corpus is a writ of liberty, and relief cannot be granted by virtue thereof until the relator is entitled to his liberty. The proceedings were premature, and the writ should have been dismissed. (*People ex rel. O'Brien v. Woodworth*, 78 Hun, 586; *People v. Sutton*, 24 N. Y. St. Repr. 726; S. C., 6 N. Y. Supp. 95; *People ex rel. Trainor v. Baker*, 89 N. Y. 460.)

The order should be reversed and the proceedings dismissed.

All concurred, except WARD, J., dissenting.

WARD, J. (dissenting) :

The relator was convicted for a violation of the Liquor Tax Law on the 23d of January, 1897, in the Niagara County Court and sentenced by that court to be imprisoned in the Niagara county jail at hard labor for the term of six months and to pay a fine of \$1,050, or to be imprisoned until the fine was satisfied, not exceeding 1,050 days. The defendant was a saloon-keeper in Lockport, N. Y. He had not obtained a liquor tax certificate. The amount of tax imposed upon a person trafficking in liquors as a keeper of a saloon in the city of Lockport was, in the year 1896, after the enactment of the Liquor Tax Law, \$350. Before the expiration of the term of imprisonment, and in April, 1897, a justice of the Supreme Court issued a writ of habeas corpus, returnable at a Special Term of that court, to inquire into the cause of the imprisonment of the relator by the sheriff of Niagara county and directed to him, which writ was issued upon the petition of the relator alleging that he was illegally detained and imprisoned by the sheriff. The sheriff made return to the writ that the relator was in his custody as sheriff and the true cause of his imprisonment and restraint by him was the sentence aforesaid. Upon the hearing of the writ, the court at Special Term made an order May 7, 1897, that the relator be remanded to the sheriff of Niagara county and there remain until the expiration of six months from Jan. 23, 1897, and upon the expiration of the said term of six months that he be discharged from the custody of the said sheriff.

The court below held that that portion of the sentence which directed that the relator be imprisoned until the fine was satisfied, not to exceed 1,050 days, was not authorized by law and was void, and for that reason directed that the imprisonment should cease after the expiration of six months.

The sentence was certainly valid as to the extent of the six months' imprisonment. (*People ex rel. Trainor v. Baker*, 89 N. Y. 460; *People ex rel. O'Brien v. Woodworth*, 78 Hun, 586; *People v. Sutton*, 6 N. Y. Supp. 95; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, and cases cited.)

The learned counsel for the appellant insists that the whole sentence was authorized by law, and the court below committed error in its order. His argument is that the sentence is warranted by section 34 of chapter 112 of the Laws of 1896, which is familiarly known as the "Raines Law," and is an act

in relation to the traffic in liquors and for the taxation and regulation of the same. That section is as follows:

“Penalties for violations of this act.—Any corporation, association, copartnership or person trafficking in liquors, who shall neglect or refuse to make application for a liquor tax certificate, or give the bond or pay the tax imposed as required by this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than two hundred nor more than two thousand dollars, provided such fine shall equal at least twice the amount of the tax for one year imposed by this act upon the kind of traffic in liquors carried on, where carried on, and may also be imprisoned in a county jail or penitentiary for the term of not more than one year.”

This section should be supplemented by sections 484 and 718 of the Code of Criminal Procedure, which direct in effect that a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which can not exceed one day for every one dollar of the fine.

The learned court below in its opinion, which appears in the record, states as a reason for the order that the fine can only be collected and enforced under section 36 of the “Raines Law,” and can not be enforced by imprisonment.

That section provides that:

“Upon the conviction and sentence * * * of any person or persons * * * for a violation of the provisions of this act, the penalty for which is prescribed in sections * * * 34 hereof, the court or officer imposing the sentence, or the clerk of the court, if there be a clerk, shall forthwith make and file in the office of the clerk of the county in which such conviction shall have been had a certified statement of such conviction and sentence. And the clerk of said county shall immediately thereupon enter in the docket book kept by said clerk for the docketing of judgments in said office the amount of the penalty or fine and costs imposed as a judgment against the person * * * so convicted and sentenced and in favor of the State Commissioner of Excise; and said county clerk shall also enter in the docket of said judgment a brief statement setting forth the fact that said judgment is for a fine or penalty imposed for violation of the ‘Liquor Tax Law,’ and said county clerk shall immediately mail or deliver to said county treasurer or special deputy commis-

sioner for said county a duly certified transcript of said judgment."

The section further provides that if the fine and costs imposed shall be paid into court, the clerk shall pay the same to the county treasurer or special commissioner; that if the judgment shall not be paid within five days after such conviction and sentence, the clerk shall issue an execution against the property of the judgment debtor, directed to the sheriff of the county, who shall collect the said judgment out of any property of the judgment debtor, and the levy shall take precedence of any lien, mortgages or conveyances docketed against the property subsequent to the judgment, and no property of the judgment debtor shall be exempt from levy and sale on such execution, and that the money collected shall be paid to the county treasurer or a special deputy commissioner.

It does not appear that this judgment was entered or any proceedings taken under the section just quoted. There being no judgment entered, no opportunity was afforded the relator to pay any judgment and costs that should be entered under this section.

Observe that the statute from which we are quoting nowhere provides that the party convicted shall be imprisoned until the fine is paid, and the only method of collecting the fine pointed out by this statute is that indicated by section 36. Under that section no property of the judgment debtor can escape execution. So that all the tangible property or means which the debtor would have to pay the fine, if imprisoned until the fine was paid, could be reached by execution.

The peculiar provisions of the section would seem to indicate that the only method for collecting the fine or penalty is that provided for by that section. And the statute having provided a means of collecting the fine or penalty, the sections of the Criminal Code referred to do not apply. The provisions of this statute are highly penal; the violator of it is liable to imprisonment for the period of one year in addition to the penalties. In the absence of any provision in that statute to enforce the collection of the penalty by means of imprisonment, we are not to assume that the legislature intended that two remedies for the enforcement of the penalties and the collection of the fines should be concurrent, viz., those of imprisonment, and judgment and execution.

The counsel for the sheriff makes the further point that the judgment of the County Court was merely erroneous and could not be corrected by habeas corpus proceedings.

The difficulty with this contention is that a portion of the judgment or sentence was void and beyond the authority of the court to impose. The imprisonment for the penalty or fine directed by the judgment is in excess of that which, by the law, the court had the power to make, and is void for such excess, and can be so declared in a habeas corpus proceeding to relieve the convicted party from imprisonment under such void provision. (*People ex rel. Tweed v. Liscomb, supra; People ex rel. Trainor v. Baker, and People ex rel. O'Brien v. Woodworth, supra; Ex parte Lange*, 18 Wall. 163.)

The majority of the court, however, have reached the conclusion to reverse the order appealed from and dismiss the proceeding upon the ground that the proceedings are premature as held in *People ex rel. O'Brien v. Woodworth* and *People ex rel. Trainor v. Baker (supra)*, and *People v. Sutton* (6 N. Y. Supp. 95). It is true that, at the time the order appealed from was granted, that part of the sentence which imposed an imprisonment of six months had not expired; but the imprisonment for the penalty was a part of the sentence imposed, and the writ of habeas corpus was taken for the purpose of determining the validity of that portion of the sentence. The sheriff in his return to the writ justified the detention of the relator under the entire sentence. The point does not seem to have been raised in the court below that the proceedings were premature, and the opinion of the judge at Special Term discusses only the question that I have considered in this opinion.

In the history of the case stated in the appellant's points it is stated that the application was opposed upon the grounds that the relator was held in custody "by the sheriff upon a final judgment of Niagara County Court sentencing said relator to imprisonment in Niagara county jail for the term of six months, and to pay a fine of \$1,050, and be imprisoned until such fine was satisfied, not to exceed ten hundred and fifty days." The statement then refers to the order made, but the objection upon which my brethren disposed of this case was not raised, and in view of the importance of the question involved I felt it my duty to consider that question.

This appeal was heard after the six months' term of imprison-

ment had expired and the relator had been discharged upon the order of the Special Term. I think, in the absence of the objection that the proceeding was premature, the Special Term had power to pass upon the only question presented.

While some of the cases cited seem to hold that the proceeding was premature, they cannot be regarded as holding that, where the question was not raised, the court had not jurisdiction to pass upon the whole sentence and determine in advance what portion of the sentence, if any, was illegal. Indeed, an excellent reason may be found for determining that question in advance, because, after the legal portion of the sentence has expired, the prisoner may be subjected to illegal imprisonment during the time necessary to have his case disposed of upon habeas corpus.

These considerations lead to the conclusion that the order appealed from should be affirmed.

Order reversed and proceedings dismissed.

Fourth Appellate Department, December, 1897. Reported. 24 App. Div. 632.

In the Matter of the Application of GEORGE R. NOBLES, for the Revocation and Cancellation of the Liquor Tax Certificate of JAMES H. YOUNGS.

Dolson & Dolson, for appellant.

License was granted to one Duke, March 6, 1896, and was in force and uncanceled on March 23, 1896, though the building was not actually used for the sale of liquors, negotiations being had for its remodeling for such use, which was subsequently done; liquor tax certificates were issued continuously to April 30, 1898.

The order revoking and cancelling defendant's liquor tax certificate, upon the ground that the traffic in liquor was not actually and lawfully carried on upon said premises on March 23, 1896, and that defendant had made false statements in his application, was untenable, and there was no evidence showing falsity of such statements.

The certificate was a license for the building, (*People v. Hamilton*, 47 N. Y. Supp. 181) and the words "actually lawfully carried on" should be given such construction as would carry out the intent of the legislature. (*People ex rel. Wood v. Lacombe*, 99 N. Y. 43; also 95 N. Y. 558; 10 N. Y. 369; 21 N. Y. 461; 13 N. Y. 78; 22 Wend. 397; 6 Hill, 619.)

This proceeding could be brought only by the owner of a building within two hundred feet, as such a provision is made for the protection of such owners.

Clarence A. Farnum, for respondent.

No traffic was carried on on March 23, 1896, for the premises were vacant. Duke had a license which expired May 1, 1896, but such license could not avail the appellant, for his own certificate was not granted until August 31, 1896. (*People ex rel. Cairns v. Murray*, 148 N. Y. 175; *Matter of Zinzow*, 18 Misc. 653; *Matter of Ritchie*, 18 Misc. 341; *People ex rel. Sweeney v. Lammerts*, 18 Misc. 343, affd. 14 App. Div. 628.)

Order affirmed, with costs.

All concurred, except WARD, J., not voting.

Supreme Court, New York Special Term, December, 1897. Unreported.

Matter of the Application of HENRY H. LYMAN, as Commissioner, to Revoke the Liquor Tax Certificate of TRUE FRIENDS SOCIAL AND LITERARY CLUB.

STOVER, J. This is an application for the cancellation of a liquor tax certificate by reason of the violation of the law by the sale of liquors within prohibited hours. This is one of a number of clubs, so-called, where liquor is sold to any person applying for membership in the club, which is accomplished by the purchase of a ticket, or the procurement of a ticket entitling the holder to admission to the club-room. There is no doubt that liquor was sold within the prohibited hours, viz., between the hours of one and five o'clock a. m., and on Sunday. Section

31 of the Liquor Tax Law provides: "It shall not be lawful for any corporation, association, copartnership or person, whether having paid such tax or not, to sell, offer or expose for sale, or give away, any liquor: (a) on Sunday, or before five o'clock in the morning on Monday; or (b) on any other day between one o'clock and five o'clock in the morning * * *." By a subsequent provision of the act it is provided "That a corporation or association organized in good faith, under chapter 559 of the Laws of 1895, or under any law which, prior to May 6, 1895, provided for the organization of societies or clubs for social, recreative or similar purposes, and which corporation or association was actually lawfully organized, and, if a corporation, its certificate of incorporation duly filed prior to March 23, 1896, and which at such date trafficked in or distributed liquors among the members thereof, is excepted from the provisions of clauses 'a,' 'b,' 'c' and 'd' of this section * * *." It is claimed by the respondent that the burden is upon the petitioner to show that the respondent is not a club within the exception of the statute. No evidence being offered upon that subject, and the testimony not disclosing the fact, it is claimed that the petitioner has failed to make a case calling for the cancellation of the certificate. The object of the corporation, as set forth in the articles of incorporation, are stated to be "The improvement of its members in the arts of oratory, composition and debate; the fostering of a knowledge of and appreciation for English literature, and the promotion of social and friendly intercourse among its members." The presumption is that the society is engaged in carrying out the purposes of its incorporation, and, in doing so, performing such acts as are directly involved in or incident to such purposes; but it cannot be said that the sale of liquor is either a portion of or necessarily incident to the business of carrying out the purposes of the incorporation. The presumption would, therefore, be, rather, that the society was not engaged in the sale of liquor than that it was. And if the rule of law was such as is contended for by the respondent, slight evidence only would be necessary to sustain a finding that the association was not engaged in the traffic of liquor prior to March 23, 1896; the facts being almost exclusively within the knowledge of the members of the corporation themselves, and the proof of the facts accessible to the corporation, and not to the petitioner. It may be readily seen

that the principle involved is identical with that formerly arising under prosecutions for selling without a license, and the rule may be said to have been definitely settled that upon prosecutions for selling liquor without a license, the holder of the license is bound to show his license as a matter of defense, the sale having been proven. *People v. Quandt*, 2 Parker's Crim. Rep. 410; *Smith v. Joyce*, 12 Barb. 31; *People v. McIntosh*, 5 N. Y. Crim. Rep. 38; *Jefferson v. People*, 101 N. Y. 19; *People v. Briggs*, 114 id. 56. These cases cited are criminal cases, where the rule of evidence would apply perhaps more strictly than in civil cases, and I take it these applications are governed by the rules pertaining to civil cases, rather than criminal. So, in *Rowell v. Janvrin*, 151 N. Y. 60, the rule is stated to be: "That when a party counts upon the enacting clause of a statute containing an exception, as the foundation of his action, he cannot logically state his case unless he negative the exception. But if the modifying words are no part of the enacting clause, but are to be found in some other part of the statute, it is otherwise, and he may then state his case in the words of the enacting clause, and it will be prima facie sufficient." And again, "When a statutory enactment is modified by engrafting upon it a new provision, by way of amendment, providing conditionally for a new case, such modification is in the nature of a proviso." The distinction being made, "An exception takes out of the statute something that otherwise would be part of the subject-matter of it; a proviso avoids them by way of defeasance or excuse." The case of *Rowell v. Janvrin* arose upon a * * * in an action to enforce a stockholder's liability, and it was held that it was not essential to the statement of the cause of action to negative the exception, and the reason of the rule, as stated by the text-writers, is, that the fact as to the transaction is peculiarly within the knowledge of the party for whose benefit it is invoked. And, therefore, it is said in such cases, but slight evidence is sufficient to sustain the burden of proof, and as has been seen in peculiar cases arising under the statute, the burden is put upon the party seeking to avail himself of the privilege or exception of proving himself entitled thereto. And when we consider the language of the section under consideration, it seems to me to be quite clear that the Legislature intended this construction should be put upon it; for, by the first provision of the law, all persons, associations, corporations, etc., are included within the prohibition.

and by a subsequent enactment, the exception is made as to associations formed and conducting business in a specified manner. Coupled with this, the fact that the party, against whom the law is invoked, always has it within his power to prove the situation, and that the petitioner is almost powerless to obtain the evidence thereof, it seems to me that it would be unreasonable to hold that a petitioner, under a law of this character, was bound to negative, in the first instance, the exception provided by the statute. And again, upon an application, no discretion is vested in the officer granting the certificate. He has no power to investigate, but it is his duty to issue the license upon the payment of the fee, proper application being made. So it may be seen that when the party who is selling liquor is called upon to answer therefor he must stand prepared to show that he is exercising his right under a due authority and a proper license. It is no hardship for the respondent to show the fact in that regard, and the rules of evidence ought not to be so interpreted as to defeat the law, where no injury is done to any party, and a reasonable interpretation would fully accomplish the purposes of the statute. If I am correct in the views above stated, the petitioner has sustained the allegations of his petition, and the tax certificate must be delivered up to be canceled.

Supreme Court, New York Special Term, December 29, 1897. Unreported.

In the Matter of the Petition of HENRY H. LYMAN, to Revoke
a Liquor Tax Certificate of THE SHENANDOAH SOCIAL CLUB.

STOVER, J. This application comes within the rule as laid down in the case of the True Friends Social Club, with the additional finding that it is a disorderly place, and that the premises occupied by the club are the habitual resort of prostitutes for the purpose of carrying on their illegal business.

Supreme Court, New York, Special Term. Reported. N. Y. L. J. December 13, 1897.

In the Matter of the Petition of HENRY H. LYMAN to Revoke the Liquor Tax Certificate of THE YOUNG MEN'S COSMOPOLITAN CLUB.

STOVER, J.: This is an application to cancel a liquor tax certificate, and upon the evidence I think it must rest upon the fact, which it is claimed is shown, that the club as now conducted is not in good faith carrying out the purposes of its incorporation. The evidence shows that it is within the exception of the statute, that it was organized in good faith, and engaged in the traffic in liquor among its members on March 23, 1896. The club is conducted in an orderly manner, and as stated above, the only ground which can be urged with any plausibility is the one stated. The statute, I think, does not permit the court to go beyond the fact of the organization of the club as provided by the statute. A club legally organized, and which was engaged on the 23rd day of March, 1896, in trafficking or distributing liquors among its members, is entitled to continue, within the provisions of the law and is within the exception from clauses "a" and "b" of section 31. And when such a corporation continues to carry on the sale of liquor among its members, it is not within the power of the court, under the statute, to pass upon the good faith of the corporation in the exercise of the powers granted to it. This view, it seems to me, is strengthened by the fact that the Legislature has designated the class of corporations to which the law should apply, viz.: those organized under any law which, prior to May 6, 1895, was actually organized, and at such date trafficked in or distributed liquors among its members. If it had been intended to leave the question as to whether the corporation was in good faith carrying out the purposes of its incorporation to be passed upon by the court, no good reason can be assigned why a certain class of corporations, or corporations organized at one time more than another should be selected for the inquisition of the court. Under the former excise law, some discretion was vested in the granting of licenses in the excise board, and licenses might be refused to clubs, organizations or individuals, within certain discretionary lines, but it was the object of the Liquor Tax Law

to do away with this discretion, and to place all persons applying for a liquor tax certificate upon an equal plane, so that there should be no discrimination, but upon compliance with the law, all should be equally entitled to consideration. But it was discovered that there was a disposition to organize clubs for the sole purpose of trafficking in liquor under the Liquor Tax Law, and while they were ostensibly organized for other purposes, the actual and real object of the organization was the traffic of liquor. To remedy this, the Legislature said that all clubs which had been organized after the passage of the Liquor Tax Law should be within the prohibition of the law. And it was this class of clubs, and to remedy this evil, that the Legislature provided for the investigation by the court. And while it may be said that a club that "was organized prior to March 23, 1896, should no more be allowed to use its incorporation for purposes of evasion than one organized afterwards," yet that is a matter which appeals to the legislative discretion and not to the judicial. In order to come within the prohibition of the statute, the court must be able to find that the corporation was not organized in good faith, &c. The Legislature has limited the investigation to the question of the organization of such clubs as have been organized before the date fixed. It is not necessary here to determine whether the Legislature has power to authorize the court, upon a summary application, to deprive an association legally organized, of the right to sell liquor, for it seems to me that the Legislature has not given that power. Nor is it profitable to discuss here whether an action should be maintained by the Attorney General to forfeit the charter, because such an action is not before us. It may be within the power of the Legislature to permit an investigation as to whether a liquor tax certificate is being used in good faith or otherwise, without intruding upon the constitutional rights of the holder thereof; but until the Legislature has given the court the power to act in that particular, it ought not to undertake to exercise it. We are dealing with a purely statutory provision, and are not called upon to exercise any power beyond that conferred by the statute. •

Supreme Court, Dutchess Special Term, December, 1897. Unreported.

PEOPLE v. CONRAD STOCK.

BARNARD, J. S. C.: The fine imposed by section 34 of the Raines Act, so-called, is a compulsory one and must be for a certain amount. It is not like a fine imposed for a misdemeanor with or without imprisonment. By section 36 of the same act, it is provided that an execution shall issue if the judgment is not paid which is entered for the penalty imposed by the court for a verdict of the Raines Law under section 34. This execution takes precedence over all prior liens. It is, therefore, manifest that the Legislature intended to rely upon the execution for the collection of the fine under the Liquor Tax Law. It is in no sense a criminal punishment. You may punish criminally by imprisonment in addition, but you are not bound to do so. The liquor fine goes to one place and the general criminal fine goes elsewhere. The defendant is entitled to be discharged from imprisonment. The sentence of the defendant to pay a fine of three hundred dollars is legal, and as such, must be entered and enforced against the defendant's property according to the provisions of section 36 of the Liquor Tax Law.

Supreme Court, New York Special Term. Reported. N. Y. L. J.
January 20, 1898.

In the matter of the petition of HENRY H. LYMAN to revoke the
liquor tax certificate of GRAMERCY CLUB.

RUSSELL, J.: It has now been decided by the Appellate Division of the Supreme Court in this department that the applicant for a liquor tax certificate under chapter 312 Laws of 1897, while receiving a quasi property interest by the payment for the certificate and its issuance to him, receives it under the provisions of the law and subject to all of the causes provided for its cancellation under the methods of procedure pointed out by the act. (In re *Livingston v. Shady*, App. Div. 1st Dep. MSS.) A careful perusal of the evidence in this case clearly indicates that the Gramercy Club was not organized and is not carried on for

the ordinary club purposes and that the premises are carried on and conducted in a disorderly way so as to violate the safeguards provided by the statute as to the character of the places entitled to vend spirituous liquors. Those safeguards are the only substitutes for the provisions of the former law by which commissioners had some discretion in issuing licenses. It follows that the prayer of the petition must be granted and the certificate surrendered, with costs. Counsel for petitioner will present an affidavit of the disbursements so that the amount of costs can be satisfactorily determined.

Supreme Court, New York Special Term. Reported. N. Y. L. J. January 20, 1898.

In the Matter of the Application of HENRY H. LYMAN, to Revoke the Liquor Tax Certificate of the PLYMOUTH SOCIAL CLUB.

RUSSELL, J. For the same reasons which apply to the case against the Gramercy Club an order is granted revoking the liquor tax certificate in question, with costs. It is unnecessary to consider the further question as to whether the club has a legal existence. The objections by the respondent to the testimony offered are severally overruled and exceptions given. Counsel will furnish me with an affidavit of the disbursements.

Supreme Court, New York Special Term, January, 1898. Reported. 60 N. Y. Supp. 76.

In the Matter of the Application of HENRY H. LYMAN to Revoke a Liquor Tax Certificate of HENRY KORNDORFER.

BEEKMAN, J. This is a motion for a stay of proceedings pending an appeal taken by the respondent from an order heretofore made and entered herein revoking a liquor tax certificate. The motion is brought on an order to show cause with an ad interim stay, and the preliminary objection is made by the

attorney for the petitioner that the affidavit on which such order was made fails to state any reason for a shorter notice than eight days, as required by Rule 37 of the General Rules of Practice and by section 780 of the Code of Civil Procedure. It is also further objected that the order makes no provision for the service of the same on the petitioner. I think the first objection is well taken. The notice provided for in the order is less than eight days, and no reason is disclosed by the affidavit for thus shortening the time. The order was, therefore, made in violation of section 780 of the Code of Civil Procedure and rule 37 of the General Rules of Practice. The objection is a substantial one, and when raised cannot be disregarded by the court (*Proctor v. Soulier*, 82 Hun, 353.) The second objection is also well taken. The motion must, therefore, be dismissed, with \$10 costs. Notice order for settlement.

Supreme Court, Monroe Special Term. January, 1898. Reported.
22 Misc. 301.

In the Matter of the Petition of ALFRED B. BRADLEY for an Order
Revoking Liquor Tax Certificate No. 13,517.

**Liquor Tax Law—Assignee of a certificate conniving at illegal acts of
occupant of a saloon—Cancellation.**

Where it appears, in proceedings taken to revoke a certificate issued under the Liquor Tax Law (Laws of 1896, chap. 112), that, almost immediately after the certificate was issued, its owners assigned it to another although continuing to conduct the business themselves, and that they thereafter persistently violated that provision of the law which forbids the existence, in a room where liquors are sold, of any inclosed box or stall which prevents a full view of the entire room, and that they also unlawfully employed, to sell and serve liquors, a person who, to their knowledge, had been convicted of a felony, the certificate must be canceled, notwithstanding the property rights therein of the assignee, as he must, by his conduct, be deemed to have assented to the unlawful acts of his assignors.

PETITION for order revoking liquor tax certificate.

Charles E. Bostwick, for petitioner.

Louis H. Jack, for respondents.

DUNWELL, J.: Proceeding for an order to revoke and cancel a liquor tax certificate under subdivision 2, section 28, of the Liquor Tax Law.

The certificate in question, No. 13,517, was issued May 1, 1897, to William E. Hall and Maurice J. Scollard, composing the partnership of Hall & Scollard, authorizing the sale of liquors under subdivision 1, section 11 of the Liquor Tax Law.

On the 4th day of August, 1897, the petitioner, Alfred B. Bradley, entered complaint with the department of excise that Hall & Scollard were violating the Liquor Tax Law.

This proceeding was brought into this court by said Alfred B. Bradley upon a petition alleging that said Hall & Scollard had in one of the rooms in which the traffic in liquors was carried on by them under said certificate an inclosed box or stall, which prevented a full view of the entire room in which they sold liquors by persons therein, in violation of subdivision h of section 31 of the Liquor Tax Law of the State of New York, which reads as follows: "And it shall be unlawful to have at any time in a room where liquors are sold any inclosed box or stall, or any obstruction which prevents a full view of the entire room by every person present therein." Also that said Hall & Scollard unlawfully permitted one John McKeough, who had been convicted of a felony, to sell and serve liquors upon said premises contrary to subdivision f, of section 31 of the Liquor Tax Law, which reads as follows: "And it shall be unlawful to knowingly permit any person who has been convicted of a felony to sell or serve any liquor upon the premises."

A referee was appointed upon the presentation of the petition to take the evidence relating to these charges. The petitioner appeared before the referee by his attorney, Charles E. Bostwick, Esq., and Hall & Scollard, and Stephen Rauber, assignee of said liquor tax certificate, by their attorney, Louis H. Jack, Esq.

It was conceded upon the hearing that Hall & Scollard sold liquors under said certificate at their place of business, No. 22 Front street, city of Rochester, N. Y., from the date it was issued, May 1, 1897, to August 18, 1897. The alleged violation took place between these dates.

The evidence upon the hearing before the referee clearly established that Hall & Scollard did maintain at all times during the period they sold liquors under said certificate at their place of business, in a room where liquors were sold, an inclosed stall

and obstruction formed by curtains suspended from wires overhead which prevented a full view of the entire room by persons present therein, in violation of subdivision h of section 31 of the Liquor Tax Law.

The evidence also establishes that said Hall & Scollard unlawfully permitted said John McKeough, a person who had been convicted of a felony, as was well known to said Hall & Scollard, to sell and serve liquor upon said premises during the occupancy thereof by said Hall & Scollard, and while they were engaged in the business of selling liquors upon said premises under said certificate, in violation of the provisions of subdivision f of section 31 of said Liquor Tax Law.

As to Hall & Scollard, it is not seriously contended but that the certificate is revocable as to them upon the alleged violation being established.

But, Rauber, who took an assignment of the certificate from Hall & Scollard almost immediately after it was issued to them, alleges that by his assignment, which is permitted by law, he acquired property rights in the certificate of which he can not be deprived by the wrongful acts of Hall & Scollard.

Section 27, which authorizes the assignment, provides that the assignee, upon proper application, security, etc., and upon obtaining a proper indorsement thereon, by the officer who issued the certificate, may carry on the business at the same place. By section 25, the holder of such a certificate may surrender the same upon ceasing to traffic in liquors and obtain a rebate thereon for the unexpired term.

Thus it is seen that, by a proper assignment rights may be acquired having a definite pecuniary value. The purchaser may employ the certificate to carry on the liquor business or may convert it into money by a surrender of the certificate and acceptance of the rebate.

But it must not be lost sight of that the liquor tax certificate is, after all, in the nature of a license granted by a law enacted under the police power of the Legislature. *People ex rel. Einsfeld v. Murray*, 149 N. Y. 367.

A prominent feature of the law is its restriction upon the traffic. In this case the assignee permitted Hall & Scollard to hold the certificate and carry on their business thereunder after the assignment to him and until the violation aforesaid was committed, without in any manner making it known that a change

in the ownership thereof had taken place and without taking any of the steps. subsequent to assignment, necessary to reduce the certificate to his personal control or to realize the property value therein. In all probability he intended that Hall & Scollard should hold the certificate so long as they remained customers of his company, during the term for which it was granted, unless for some cause they should go out of business.

By taking this course, the assignee of the certificate permitted Hall & Scollard, to whom it was issued, to remain the possessors and holders thereof, and carry on the liquor business by means thereof. He thereby subjected the certificate to all risks that might attach to it from a violation of the law by them. Otherwise, the whole scheme of the statute providing for a revocation of the certificate for violations could be evaded by a process, the simplicity of which would lead to frequent, if not universal, resort thereto.

Being satisfied that Hall & Scollard are guilty of the violation of the Liquor Tax Law aforesaid, in permitting said McKeough to sell liquors upon their said premises licensed by said liquor tax certificate, after knowledge, on their part, that he had been convicted of a felony; and in maintaining said stalls and obstructions, preventing a full view of the entire room where liquors were sold by persons present therein, and consequently that said Hall & Scollard are not entitled to hold such certificate, the order asked for in the petition is granted, revoking and canceling such certificate, with a provision that the holder of said liquor tax certificate and any person having such certificate in his possession or control shall forthwith surrender said certificate to the officer who issued the same or his successor in office.

Costs to the amount of \$70 are allowed against the three defendants, Hall, Scollard and Rauber.

(Ordered accordingly.)

Supreme Court, Genesee Special Term, January, 1898. Reported.
22 Misc. 380.

THE PEOPLE ex rel. MORRIS C. DECKER et al., Relators, v. ALBERT
A. PARMELEE et al., Defendants.

Election Law—A recount of ballots, cast at a town meeting upon the question of selling liquor, may be compelled—Insufficient alternative writ of mandamus—Effect of petition and affidavits.

The court has power, under the Election Law (Laws of 1896, chap. 909, §§ 111, 113, 114), to require, by mandamus, a recount of ballots rejected at an election, had at a town meeting, where there was a special vote under the Liquor Tax Law (Laws of 1896, chap. 112, § 11, subds. 1, 16) to determine whether liquor should be sold in the town; but where an alternative writ, issued *ex parte*, contains no allegations as to whether a proper legal return was made, or whether if made, it contains a statement that the ballots sought to be counted were declared void, or whether the ballots in question were, in fact, declared void and were so indorsed, or whether the inspectors failed to count any protested ballots, the writ is insufficient to justify the issue of a peremptory writ; nor can resort be had to the petition or affidavits in order to sustain it.

DEMURRER to alternative writ of *mandamus*.

Bowen & Washburn, for relators.

Randall & Huyck, for defendants.

LAUGHLIN, J. The alternative writ, issued *ex parte*, recites that the defendants, other than the county treasurer, constituted the town board of the town of Leroy, Genesee county, and as such, the inspectors of election at the town meeting held on the 2d day of March, 1897, at which time a separate vote was taken, under subdivision 1 of section 11 of the Liquor Tax Law, on the question as to whether liquor should be sold in that town; and that on the canvass of the votes "they rejected 102 ballots and the votes thereon which should have been canvassed and counted by them, for alleged technical errors and defects." It is further alleged in the writ that the proposition for selling liquor was declared lost, whereas if the rejected ballots had been counted a majority would have been shown for such proposition. The demurrer is upon the ground that the writ fails to state facts sufficient to authorize the court to grant the relief awarded, to-wit: a recanvass of the rejected ballots, that they be all counted

for or against the proposition and that the present recorded result of the election be amended or superseded by a new return showing the true result. The writ directs the town clerk to deliver a sealed package containing the rejected ballots to the inspectors, and, while there is no specific allegation of the fact, it is to be inferred that these ballots have been preserved in the manner provided by section 113 of the Election Law for preserving void and marked ballots. The case was argued upon the theory that the ballots were thus preserved.

Section 16 of the Liquor Tax Law provides for the submission to the electors of the proposition as to whether liquor shall be sold, upon a ballot in the form of the ballot required for voting on constitutional amendments, and with respect to the canvass and return of the votes, provides as follows:

“At such town meeting the several questions may be voted upon by the electors who may legally vote thereat. A return of the votes so cast and counted shall be made as provided by law, and if the majority of the votes shall be in the negative on either of such questions, no corporation, association, copartnership or person shall thereafter so traffic in liquors or apply for or receive a liquor tax certificate under the subdivision or subdivisions of such section 11 upon which the majority of votes have been cast in the negative. * * * A copy of the statement of the result of the vote, upon each of such questions submitted, shall, immediately after such submission thereof, be filed by the town clerk or other officer with whom returns of town elections are required to be filed by the Election Law, with the county treasurer of the county * * * and no liquor tax certificate shall thereafter be issued by such officers to any corporation, association, copartnership or person under such subdivision of section 11 of this act upon which a majority of the votes may have been cast in the negative.”

Upon grounds of public policy the courts have, with one exception I believe (the case of *People ex rel. Sanderson v. Payne*, 12 Abb. N. C. 103), uniformly held that after the ballots have been canvassed and destroyed under the laws which formerly provided for disposing of them in that manner, that a writ of *mandamus* should not issue to compel the election officers to reconvene and make a new return changing the result, on the ground of fraud or mistake in making the original canvass or return. In view of the very material changes contained in section 11 of the

Election Law, by which the ballots are now preserved in the condition in which they are voted and, under section 113, may be inspected by an order of the court, it may well be that the rule hereinbefore referred to should not be now applied to such ballots.

Section 114 of the Election Law now expressly provides that a writ of *mandamus* may issue, upon the application of any candidate voted for at the election, requiring a recount of the votes on the ballots rejected by the inspectors as void and not counted, and also the ballots objected to as marked for identification. The inspectors are required to indorse on all ballots which they reject and exclude from the count as void the specific reason for such rejection, and the return must specify the number of such ballots. § 111 of Election Law. The same section of the law requires the inspectors to indorse on all ballots protested as marked for identification the words "Protested as marked for identification," specifying over their signatures the mark or marking to which objection is made, and while they are required to count such protested ballots, their return must contain a statement of the number. The inspectors are also required to preserve and return in a sealed package the void and protested ballots. If that has been done, such ballots are presumably now in the same condition as when the ballot-boxes containing them were opened by the inspectors at the close of the polls and before the canvass. *Matter of Election of Member of Assembly*, 18 Misc. Rep. 391, and cases cited.

The alternative writ demurred to does not require a recanvass of the votes *counted*, but only of the votes *not counted*. The inspectors had no authority to reject the ballot and exclude it from the count excepting where they determined that the ballot was void, and after such determination indorsed upon it the specific reason for the rejection. The writ charges that by the action of the inspectors about one-tenth of the qualified voters of the town of Leroy were disfranchised by having their ballots wrongfully excluded from the count. The legislature has not deemed it against public policy to compel a recanvass of the void and protested ballots containing the names of candidates for office, but has expressly provided that this may be done § 114 of Election Law. The counsel for the inspectors contends that inasmuch as no express provision has been made by the legislature for a recount of the votes on constitutional amend-

ments and other propositions, that no authority exists, either under the statute or at common law, therefor.

If the provisions of the General Election Law relating to void and protested ballots do not apply to constitutional amendments and propositions submitted to the voters, then it would be the duty of the inspectors under the Liquor Tax Law hereinbefore quoted to count all the ballots where they were able to determine the intention of the voter, and the right to the writ of *mandamus* would be clear. It has always been the law that without any statutory authority the Supreme Court possesses inherent power, by the writ of *mandamus*, to compel all public officials to perform their statutory duties. Under this power boards of canvassers and election inspectors may be compelled to reconvene and completely discharge, as required by law, any duty devolving upon them which they have not fully discharged. *People ex rel. Emerson v. Board of Aldermen*, 47 N. Y. St. Repr. 451; affirmed, 65 Hun, 300; see cases cited in both opinions.

Upon the same principle, if the inspectors have not filled out and signed their return as required by law they will be compelled to meet again and do so; or, if they have filed conflicting returns, they will be compelled to file new and correct returns. *People ex rel. Gleason v. Blanc*, 14 Misc. Rep. 620.

If the inspectors were governed by the Election Law in canvassing and making a return of the ballots voted on this proposition as to whether liquor should or should not be sold in Leroy, then it was their duty to comply with all of its provisions, including the statement in their return of the number of void and protested ballots separately, properly indorsing such ballots and sealing and returning the same.

The construction of the Election Law contended for by the defendants would lead to the anomaly of having the void and protested ballots on constitutional amendments and other propositions submitted thus indorsed, sealed and returned by the inspectors and with authority on the part of the court to open and inspect the same, but all to no purpose, as the court would be entirely without authority to require the correction of any error that might clearly appear to have been made.

The writ does not contain any allegation as to whether a proper return was made as required by law, or whether the return contains a statement that the ballots sought to be counted were declared void, or whether the ballots were in fact declared void

by the inspectors and so indorsed; or whether the inspectors failed to count any protested ballots. In a matter of this importance, while I am impressed with the propriety of compelling these inspectors to properly perform their statutory duties and of reviewing their action, at least to the extent of determining whether they have complied with the law, yet a peremptory writ of *mandamus* should only issue on facts conceded or found, and I think the allegation of the alternative writ that these ballots should have been counted is an allegation of a legal conclusion, and that the writ fails to state the facts warranting the conclusion. If the court were to issue a peremptory writ on this alternative writ, for aught that appears the inspectors might be compelled to count void ballots which were properly declared void, indorsed as void, returned as void and accounted for in the return as void. On a demurrer to an alternative writ of *mandamus* resort can not be had to the petition or affidavits for the facts to sustain it. The alternative writ is a pleading and must stand or fall on the sufficiency of its own recitals of facts. Code Civ. Pro., § 2076; *People v. Columbia Club*, 20 Civ. Pro. Rep. 323.

The demurrer must, therefore, be sustained.

For the purpose of determining whether the relator should have leave to amend, I have examined the petition and affidavits, and think they present a meritorious case. The demurrer is sustained, but with leave to the relators, within twenty days, and upon payment of costs, to amend the writ by citing a plain and concise statement of the facts set forth in the petition and affidavits on which the writ was issued, or to apply to the court for an inspection of the void and protested ballots, and for leave to serve an amended writ setting forth what is shown by such ballots, and upon other affidavits as they may be advised. An interlocutory judgment may be entered accordingly.

Judgment accordingly.

Supreme Court, New York Criminal Term, January, 1898. 23 Misc. 504.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* BECKIE KURMINSKY, Defendant.

Liquor Tax Law—An indictment found under it may, on the application of the district attorney, be dismissed by the court, in furtherance of justice—Practice as to a *nolle prosequi* considered—Code of Criminal Procedure, § 671.

The power and right of a district attorney to apply, under section 671 of the Code of Criminal Procedure, to the court for the dismissal of an indictment, in furtherance of justice, is, in the case of an indictment found under the Liquor Tax Law (Laws of 1896, chap. 112), neither affected nor impaired by sections 37 (as amended by Laws of 1897, chap. 312) and 38 of that statute, making it the duty of a district attorney to prosecute any person violating the statute and further declaring that "any officer who shall neglect or refuse to perform his duty under its provisions shall be liable to a penalty of \$500, and if a district attorney shall be removed from office." These sections do not, by implication, repeal section 671 of the Code of Criminal Procedure. Former and present practice, relative to the entry of a *nolle prosequi*, considered.

APPLICATION to dismiss an indictment.

Asa Bird Gardiner, district attorney, for People.

Mr. O'Haire, for defendant.

FURSMAN, J. This is an application to dismiss an indictment. The district attorney had indorsed upon the indictment the following statement: "Were this case to be the subject-matter of an official recommendation to the court, I should unhesitatingly affirm the impossibility of a conviction upon the merits, and request the court to make a final disposition thereof by the dismissal of this indictment." In view, however, of the provisions of sections 37 and 38 of the Liquor Tax Law (Laws of 1896, chap. 112; amended 1897, chap. 312), he is in doubt whether such recommendation can properly and legally be made by him. He, therefore, submits that question to the court for determination.

At common law the attorney-general alone had power to enter a *nolle prosequi*. This he could do without application to the court. Indeed, the court itself could not, of its own motion,

direct the entry of this order. See *People v. McLeod*, 1 Hill, 377, at p. 405. In actual practice, however, it became customary for district attorneys, who were regarded as in some sense representing the attorney-general, to exercise this power. This very questionable practice led to the adoption of a provision in the Revised Statutes declaring it to be unlawful for any district attorney to enter a *nolle prosequi* upon any indictment, "or in any other way to abandon the same" without leave of the court. Edmonds' edition N. Y. Statutes at Large, vol. 2, p. 752 § 54. Even under this statute it was said that the court could not of its own motion enter a *nolle prosequi*. *Thomason v. De Mott*. 18 How. Pr. 529. There was always, however, inherent power in the court to set aside an indictment in a proper case, whether of its own motion, or on motion of the accused, or of the district attorney. *People v. Brickner*, 15 N. Y. Supp. 528; *People v. Restenblatt*, 1 Abb. Pr. 268; *People v. Briggs*, 60 How. Pr. 17; see page 42 and cases there cited. This was the history of the law concerning the rights and power of the court and the district attorney in relation to the disposition of indictments, otherwise than by trial, down to the adoption of the Code of Criminal Procedure. By section 671 of that act, authority is conferred upon the district attorney to apply for the dismissal of an indictment, and the court is empowered to act upon such application and to order such dismissal, or it may do so on its own motion. The precise question here is, whether there is anything in sections 37 and 38 of the Liquor Tax Law taking from the district attorney the right to make the application provided for by section 671 of the Code of Criminal Procedure. The power of the court to order such dismissal of its own motion cannot be questioned. There is nothing in the Liquor Tax Law prohibiting such action. Section 37 of that act makes it the duty of the district attorney to prosecute any person violating any of the provisions of the act (Amendment of 1897, § 37), and section 38 (Act of 1896) declares that "any officer who shall neglect or refuse to perform his duty under the provisions of this act shall be liable to a penalty of five hundred dollars, * * * and if such officer be * * * a district attorney, shall be removed from office * * *."

There are many statutes which impose specific duties upon district attorneys, and, although no special penalty is provided for a neglect or refusal to perform them, it has always been a

recognized rule that, where the law imposes a duty upon a public officer and he neglects or refuses to perform it, he may be indicted therefor (Bouvier's Law Dict., title "Negligence"), and of course in certain cases removed from office. Among the recognized duties of this officer is the prosecution of all offenders who are presented by indictment, and it is clear that a wilful neglect or refusal to discharge this duty in any proper case will subject him to indictment and expose him to removal from office; yet he has always had authority either to ask leave to enter a *nolle prosequi* (before the Code), or, since the Code, to apply for a dismissal of any indictment. The State Constitution (art. 13), in relation to bribery declares (section 6) that "Any district attorney who shall fail faithfully to prosecute a person charged with the violation in his county of any provision of this article which may come to his knowledge, shall be removed from office by the Governor," but there can be no doubt, I think, that if, after indictment, it is found that there is an entire failure of proof, the district attorney may apply to the court for a dismissal under section 671, without exposing himself to the penalty thus prescribed for not "faithfully" prosecuting the person indicted. Section 38 of the Liquor Tax Law is highly penal and is, therefore, to be construed with great strictness. There is no provision of the act expressly repealing section 671 of the Code of Criminal Procedure, nor is there any conflict between them such as to create a repeal thereof by implication. The statute does not mean that the district attorney shall prosecute a hopeless case. The law never requires the performance of a vain thing. Suppose, after an indictment found under this law, the district attorney in commencing his preparation for trial discovers that every witness has since died and he is, therefore, without a particle of proof. Must he put the defendant upon trial, impanel a jury, open his case, and then declare that he is without the least proof to sustain the charge and leave the court to direct an acquittal? The legislature cannot have meant to require such a foolish thing. This is, of course, an extreme case, but it furnishes an illustration by which the intent of the legislature, as affecting section 671, may well be tested. This section (671) and the duties and penalties imposed by sections 37 and 38 of the Liquor Tax Law are in harmony rather than in conflict. Thus considered, the requirement of section 37 is the performance by the district attorney of th

duty of prosecution whenever there is fair reason to believe, from the evidence at command, or which by diligence may be obtained, that a conviction can be, or, if properly weighed, ought to be had; and the penalty imposed by section 38 is for a wilful or corrupt disregard of this duty, or, at most, a careless neglect to perform it. But where a diligent and honest investigation discloses an utter want of necessary proof, or if for any other reason in the intelligent and honest discharge of his duty the district attorney becomes satisfied that a conviction cannot be had, he may avail himself of the provisions of section 671, and recommend a dismissal without thereby exposing himself to any penalty whatever. It would, indeed, be monstrous to say that a district attorney will make himself liable to a fine and removal from office for suggesting to the court a state of facts and recommending a dismissal of an indictment thereon in a case where the court might, and indeed ought "in furtherance of justice" to direct a dismissal of its own motion, upon deriving the same information from any other source.

Ordered accordingly.

Third Appellate Department, January, 1898. Reported. 25 App. Div. 68.

HENRY H. LYMAN, as State Excise Commissioner of the State of New York, Appellant, *v.* JOHN C. MCGRIEVEY, Respondent.

Liquor Tax Law—How, for its purposes, the population of a village is to be determined.

To determine the population of a village under the Liquor Tax Law (Chap. 112 of the Laws of 1896), except in the case "of the incorporation of a new city or village," either the last State or Federal census must be resorted to; a certificate made December 16, 1896, by the "Chief of Census Division, Department of the Interior" of the United States, "that the paper hereto attached is a statement as nearly correct as can be ascertained from the population schedules of the population, according to the census of 1890, of the towns and villages named therein," is not competent proof for the purposes of such Liquor Tax Law of the population of a village named therein.

APPEAL by the plaintiff, Henry H. Lyman, as State Excise Commissioner of the State of New York, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Saratoga on the 4th day of October,

1897, upon the decision of the court rendered after a trial at the Saratoga Special Term dismissing the complaint upon the merits.

M. Nussbaum, for the appellant.

Thomas O'Connor and J. W. Houghton, for the respondent.

LANDON, J.: Prior to May 1, 1896, the plaintiff stated, pursuant to clause 7 of section 15 of the Liquor Tax Law (Chap. 112, Laws of 1896), the amount of the tax assessed upon the business of trafficking in liquors in the village of Waterford, Saratoga county, under class 1, subdivision 1, section 11 of the act, at \$200, assuming for the purpose that the population of the village was more than 1,200 and less than 5,000.

The act itself makes the assessment. Section 11 provides: "Excise taxes upon the business of trafficking in liquors shall be of four grades and assessed as follows:"—then follow, in four subdivisions, specifications of each grade or class respectively, and in each subdivision these words are used, "There is assessed an excise tax to be paid by," etc., and then the various sums assessed as to each grade are fixed at sums varying in cities and villages according as the population in each is shown by the last State census to be between the larger and smaller numbers specified in each case.

With respect to the case before us, the 1st subdivision of section 11 declares the assessment to be: "If in a village having by said census a population of less than 5,000, but more than 1,200, the sum of two hundred dollars; if in any other place, the sum of one hundred dollars." The section further provides that "when the population of a city or village is not shown by the last State census, it shall be determined for the purposes of this act by the last United States census."

The defendant contended that the statement made by the plaintiff of "the amount of the tax assessed" (clause 7 of the 15th section) was erroneous, since the population of the village of Waterford was not shown either by the last State census or by the last United States census, and, therefore, that the amount assessed by the act was \$100.

Section 12 of the act provides that "the several amounts to be paid as taxes under this act are assessed yearly, commencing on the first day of May, eighteen hundred and ninety-six, and shall be paid yearly on the first day of May of each year."

Accordingly, on May 1, 1896, the defendant paid the county treasurer of Saratoga county \$100 for a liquor tax certificate, and in every other respect complied with the terms of the act. The plaintiff thereafter stated the amount of the tax assessed at \$100, revoking his former statement of \$200, and then advised the county treasurer to accept the sum of \$100 and issue the certificate to the defendant, and the county treasurer did so May 26, 1896.

Subsequently, upon examination of the enumerators' original returns of the last United States census for the districts embracing the town and village of Waterford, the plaintiff concluded that the United States census did show that the population of the village of Waterford was more than 1,200 and less than 5,000, and, thereupon, in December, 1896, he stated "the amount of the tax assessed" at \$200 for the year commencing May 1, 1896, and then instructed the county treasurer to give the defendant notice and to demand the unpaid balance of the \$200. This the county treasurer did; the defendant refused to pay the additional \$100. The treasurer demanded a return of the tax certificate; this the defendant refused; the plaintiff thereupon caused a notice of a lien for \$100 to be filed with the clerk of the town of Waterford upon the property of defendant in the premises where he carried on his liquor traffic, assuming to act under section 12, and then commenced this action to foreclose the lien.

We think the judgment in favor of the defendant should be affirmed.

The trial court found that the population of the village of Waterford is not shown by either the last State or Federal census. It was conceded that it is not shown by the last State census. It was not shown by the United States census. It is clear from an inspection of the enumerators' returns that it is not determinable from them except by resort to extrinsic evidence, and the extrinsic evidence offered leaves the matter in uncertainty. The State assumes that one census or the other will show the population of the several villages, and itself assesses the tax accordingly. It does not vest the plaintiff with the power to make the assessment, but only the power to state the amount which the statute assesses. If either census fails to give the total of the population, but gives the data from which the total can be computed, then the census affords the necessary evidence of the determination by it; but it may be doubted whether the enumerators' returns are the

census; they furnish the data from which it is made, but are not themselves the finished product. Be that as it may, the statute does not give the plaintiff any power of determining the population except in the single case "of the incorporation of a new city or village," when "the State Commissioner of Excise is authorized and directed to cause an enumeration of the inhabitants to be taken in such city or village." (§ 11, subd. 4.) This shows the extent of his power in this respect.

The plaintiff offered, and the court excluded, a certificate made December 16, 1896, seven and a half months after defendant paid the \$100, by George S. Donnell, "Chief of Census Division, Department of the Interior," "that the paper hereto attached is a statement as nearly correct as can be ascertained from the population schedules of the population according to the census of 1890 of the towns and villages named therein." The paper thereto attached stated the population of the village of Waterford to be 4,251. The official character of Mr. Donnell was duly certified. The statute assessed the tax on or before May 1, 1896. This certificate had no existence then, and, therefore, was then no part of the census.

If admissible, the certificate is valueless as evidence, because the statement that it is as nearly correct as can be ascertained from the schedules leaves the degree of its correctness unknown. But this certificate of the chief of the census division is not the census itself, but only his declaration of what he thinks is the best information he can extract from the population schedules. It is not a certified copy of any paper, and, therefore, not admissible as such under section 882 of the United States Revised Statutes, or section 944, Code of Civil Procedure. The trial court properly excluded the certificate, and properly held that resort could not be had to any other evidence than one or the other census to show the population of the village. (*People ex rel. Cramer v. Medberry*, 17 Misc. Rep. 8.)

The defendant paid the tax which the statute assessed, and no larger sum could be lawfully required of him.

The objection was taken by defendant's answer and upon the trial that the plaintiff has no legal capacity to sue or recover if any cause of action against the defendant exists, but that the same is vested in the treasurer of Saratoga county and in him only.

We think the point well taken. There is no express authority

conferred upon the plaintiff to bring such an action as this, and the scheme of the act shows that none is implied. Section 11 fixes the amount to be paid for tax licenses in the various localities. Section 13 provides that "The taxes assessed and all fines and penalties incurred under this act in counties containing a city of the first class shall be collected by and paid to the special deputy commissioner for such county, and in all other counties to the county treasurer of the county in which the traffic is carried on, except that the taxes assessed under subdivision 4 of section 11 of this act, and all fines and penalties in connection therewith, shall be collected by and paid to the State Commissioner of Excise, and by him to the State Treasurer." The exception refers to licenses for the sale of liquor on railroads, steamboats and other vessels, the revenues from which belong to the State, whereas only one-third of the revenues collectible by the county treasurer belong to the State; two-thirds thereof belong to the town or city in which the traffic is carried on. The county treasurer must pay them over accordingly. Sections 14, 17, 19, 20, 25, 29 and 36 are framed in harmony with the scheme that the county treasurer is the collector of the assessments and penalties.

There are two sources of revenue under the act; one the taxes assessed by the act itself, and the other the penalties, fines and forfeitures for its violation; these are imposed by the court upon the conviction of the offender. The taxes, except in cities of the first class, and upon railroads and vessels, are collectible in the first instance by the county treasurer; the penalties are also payable to and collectible by him. It is true that section 36 provides that upon conviction and sentence, if a fine or penalty be imposed, a judgment for the amount thereof shall be docketed in favor of the Commissioner of Excise against the offender. But if the fine be paid into court, or collected by the sheriff upon execution, it shall be paid to the county treasurer.

This case does not involve a fine, penalty or forfeiture, but it is instructive to notice that these also come to that officer first or last.

Incidental to his power to collect the tax is the power to prosecute such civil actions and remedies as are appropriate for the purpose, upon the principle that the right carries with it the remedy.

The judgment should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

First Appellate Department, January, 1898. Reported. 25 App. Div. 222.

In the Matter of the Petition of GEORGE HILLIARD, Special Deputy Commissioner of Excise, Respondent, for an Injunction Restraining ANNIE GIESE, Appellant, from Trafficking in Liquors.

Liquor Tax Law—A certificate is a contract and property—it can not be impaired or taken away by a subsequent enumeration.

A liquor tax certificate constitutes a contract between the person to whom it is issued and the State; the right acquired thereby is property, and its owner is entitled to the same protection in this property as in any other.

A liquor tax certificate, issued on April 20, 1897, to a resident of the annexed district of the city of New York, to take effect May first of that year, is not rendered invalid by the fact that, upon an enumeration of the inhabitants of such district, made under the authority of the excise commissioner, pursuant to chapter 312 of the Laws of 1897, taking effect April twentieth, the enumeration being completed on April 25, 1897, the tax required by the commissioner is larger than that paid by the holder of the certificate.

Such amendment does not become operative until the enumeration required by it has been finished.

APPEAL by Annie Giese from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 5th day of November, 1897, granting an injunction restraining the said Annie Giese from trafficking in liquors upon certain premises until she shall have paid the liquor tax assessed thereon and obtained a liquor tax certificate in pursuance of law.

Arthur Furber, for the appellant.

Alfred R. Page, for the respondent.

RUMSEY, J. The respondent, as special deputy commissioner of excise, has applied to this court upon petition and affidavit for an order restraining the appellant from trafficking in liquors in the annexed district of the city of New York, until the liquor tax assessed upon her premises shall have been paid and a liquor tax certificate obtained in pursuance of the law. A certificate was issued to her in due form by the proper authorities,

on the 20th of April, 1897, authorizing her to sell liquor for one year from the 1st of May, 1897. It is conceded that this certificate was valid at the time that it was issued, and it is not claimed that the appellant has in any way violated the Liquor Tax Law. The claim is that, by reason of the provisions of the amendments to that law which took effect on the day on which the certificate was issued to her, and which became operative five or six days afterwards, a certificate which was valid when it was issued has ceased to be valid, and for that reason the commissioner of excise is entitled to an injunction to restrain her from continuing to sell liquor under its authority. No action has been commenced, but this is a special proceeding begun pursuant to section 29 of the law (Chap. 112, Laws of 1896) providing that if any person shall unlawfully traffic in liquor without obtaining a liquor tax certificate, the proper person, who in this case is the special deputy commissioner, may present a verified petition to a justice of the Supreme Court or to a Special Term of the court for an order enjoining such person from trafficking in liquor; and the court is authorized, if it is satisfied that such person is so doing, to issue the injunction. This mode of procedure is established by the statute, and exists only by its authority; and all the power which the court has to issue an injunction in this special proceeding, no action having been commenced, is derived solely from it. It is very doubtful whether this case comes within the statute, because the claim of the respondent is not that Mrs. Giese is trafficking in liquor without obtaining a liquor tax certificate, but that the tax certificate which she has obtained and which undoubtedly was valid when it was issued, has, by the course of subsequent legislation, become invalid.

But, passing that point, which is not insisted upon by the appellant, it is necessary to consider whether, in fact, the appellant had a valid tax certificate, and whether that certificate, if valid when it was issued, became invalid by the subsequent course of legislation or the action of the excise department of the State. The manner of procedure to obtain a liquor tax certificate is especially prescribed in the statute. Every person who desires to sell liquor must apply to the proper person in a form prescribed by the statute for the issuance of such certificate to him. With the application must be given a bond in a form also prescribed by the statute. (Laws of 1896, chap. 112, §§ 17, 18.) This

application must be made on or before the first day of May. The tax is due and payable on the first day of May (§ 12), but section 21 of the statute makes provision for cases in which the tax shall have been paid not less than fifteen days before the time fixed for the expiration of the former tax certificate, from which it is fairly to be inferred that the tax may be paid by the person making the application at the time of making it, and the payment need not necessarily be postponed until the very day on which it is due. It is further provided by section 19 of the act that, after the application and the bond shall have been found to be correct in form, and the sureties upon the bond have been approved, then, upon payment of the tax, the proper officer shall at once prepare and issue a legal tax certificate in the form provided by the act. In this section is found the only authority to issue a tax certificate, and it is to be noticed that it can be issued only upon payment of the tax prescribed, and the payment is a condition precedent; so that it is quite clear that the officer upon whom is devolved the duty of issuing the certificate can only issue it after the tax has been paid. The owner of the certificate cannot be deprived of it except for some violation of the law. The statute provides that under certain circumstances this certificate may be surrendered, but the surrender can only be made in the manner and at the time provided by section 25 of the Liquor Tax Law, and when surrendered the officer receiving it is authorized to repay to the owner the proper proportion of the amount of the tax for the unexpired term of the certificate, from the first of the month succeeding the time on which the surrender is tendered; so that under no circumstances, after the first day of May in any year, could the certificate be surrendered and the owner receive back the full amount paid, but in any case the commissioner is required to retain at least one-twelfth of the tax.

The certificate, when it has been issued, constitutes a contract between the person who received it and the State, by which, for the consideration paid by the owner, the State has granted to him an absolute right to traffic in liquors for one year from the first of May subsequent to the date on which the certificate is granted, and of which he can only be deprived for some violation of the law so long as the statute remains in force. The right is a valuable one. It is property, and the person who receives it has the same right to be protected in this property as in any other for

which he has paid a valuable consideration and of which he is the owner. (*People v. Durante*, 19 App. Div. 292; *Niles v. Mathusa*, 20 id. 483.)

It appears in this case that Mrs. Giese was the owner of premises situated in that district of the city of New York which was annexed in the year 1895. On the 20th of April, 1897, she applied in proper form for a liquor tax certificate to entitle her to traffic in liquors from the first of May following. The tax required from her at that time was \$100. This sum she paid, and on that day a certificate in due form was issued to her. There is no doubt, and it seems to be conceded, that the certificate then issued was valid, and, in the absence of any change in the statute, would have been sufficient to protect her in the lawful conduct of the business for the year during which it was in force. On the day on which the application was made an amendment to the Liquor Tax Law became a law, by which it was provided that if, since the last State enumeration, the boundaries of a city should have been changed by the addition of territory not in the same judicial district, such annexed territory should not be deemed a part of the city for the purpose of determining the amount of excise tax therein, but the inhabitants of that territory should be enumerated for the purpose of determining the amount of the tax, and when the enumeration had been had the tax assessed therein should be the same as that provided for in other places containing the same population. (Laws of 1897, chap. 312.) Pursuant to that amendment an enumeration was taken under the authority of the commissioner of excise, which was completed on the 25th day of April, 1897, and it was determined by him that the amount of the tax to be paid by persons in the annexed district in which Mrs. Giese lived and did business should be \$350 instead of \$100 as it had been. No notice seems to have been given of this to the appellant until the 10th day of May, 1897, at which time notice was sent to her that the tax assessed upon the business in her locality had been increased to \$350, and she was required either to pay the additional \$250 or to cease doing business under the certificate which had been issued to her. It is quite clear that, although the law may have taken effect on the twentieth of April, it could not become operative until the enumeration required by it had been finished. There was no provision in the statute that the issuing of certificates should be delayed until that had been done, nor was there any

requirement that it should be done at any particular time, but the Legislature seem to have been willing that, until the enumeration was taken, the rate to be paid for certificates should continue to be the same as that provided for by the act before it was amended. Nor was there anything in the act requiring that when it did become operative it should apply to all certificates which had been issued before the enumeration had been taken, but it seems to have been the intention of the Legislature that no change should take effect until the enumeration had been taken by the commissioner, because it is provided expressly that the tax assessed in each place enumerated shall be the same as that provided for the other places containing the same population. This provision necessarily implies that there can be no increase in the amount of the tax until the enumeration has actually been had. This is the plain construction of the statute and it accords with the well-settled rule that, so far as vested interests are concerned, every statute shall be deemed to be prospective in its operation except so far as the Legislature, within the limit of its powers, shall have expressly enacted to the contrary. (*Dash v. Van Kleeck*, 7 Johns. 477.) The certificate issued to the appellant, which was valid when she received it and under which she was lawfully trafficking in liquor, was not intended to be made invalid by an act which subsequently took effect. There was no way in which this certificate could have been revoked by the excise commissioner. The appellant could not have been required to give it up and receive the money which she had paid for it, because the right to surrender is exclusively given by the statute to the owner of the certificate, and upon that surrender there must be deducted from the sum paid by her the *pro rata* amount of the tax until the first day of the month after the certificate has been surrendered. There is no provision anywhere in the statute authorizing the commissioner to repay to any holder of a certificate the full amount of the tax which he has paid and receive back the certificate. Section 13 of the statute prescribes how he shall dispose of all the money which he receives in payment for the certificates, and it leaves him no discretion to repay that money and no authority to devote it to any other purpose than that provided for in the statute. There is no intention on the part of the Legislature anywhere in the act or in the amendments to give to the commissioner of excise, or to those persons who shall perform his duties, any right or

authority to interfere with a certificate after it shall have been issued, or to revoke it, or to receive back the money which has been paid for it. This certificate being valid when it was issued, there is no provision in the statute for taking away from the holder of it the protection which the statute gave her. Under it she was entitled to traffic in liquors during the time for which the certificate was granted, and in the absence of any provision by the Legislature authorizing or requiring its revocation, her right was complete and perfect, and she could not be interfered with.

For these reasons it was error to grant this injunction, and the order should be reversed and the petition for an injunction dismissed. As this is a special proceeding, costs as of an action should be granted to the appellant.

VAN BRUNT, P. J., BARRETT, PATTERSON and O'BRIEN, JJ., concurred.

Order reversed and petition for injunction dismissed with costs as of an action to the appellant.

Supreme Court, Herkimer Special Term, February, 1898. Reported.
22 Misc. 560.

JOSEPH W. BAKER, Plaintiff, v. LORENZO O. BUCKLIN, Individually
and as County Treasurer of Herkimer County, Defendant.

**Liquor Tax Law—Payment, for a certificate, not recoverable—Population
of a village not shown by the census.**

Where it is conceded that the population of a village is at least 4,000, a holder of a liquor tax certificate, voluntarily paid for upon that basis, can not, merely because the population of the village is not stated, separately from that of its town, in either the last State or United States census, subsequently recover of the county treasurer the difference between that rate and the rate fixed for a village whose population is under 1,200; and the fact that the state commissioner of excise has not caused any enumeration of the village to be made under the statute (Laws of 1896, chap. 112, § 11, subd. 4), is immaterial.

ACTION brought to recover amount claimed to have been paid by the plaintiff for a liquor tax certificate, in excess of the amount required by law.

William J. Gardinier, for Plaintiff.

E. E. Sheldon, for Defendant.

McLENNAN, J.: On or about the 1st day of May, 1896, one John T. Kerrivan, who was then county treasurer of Herkimer county, upon proper application to him made, issued to the plaintiff liquor tax certificate No. 25,103, in and for the village of Herkimer, and received from the plaintiff the sum of \$200 in payment therefor.

Within ten days thereafter said Kerrivan, as such county treasurer, turned over the moneys so received from the plaintiff to the State of New York and to the village of Herkimer, as required by law.

On the 1st day of January, 1897, the defendant Lorenzo O. Bucklin became county treasurer of Herkimer county, having succeeded said John T. Kerrivan, and ever since has been and now is such treasurer, and as such received from his predecessor all moneys, books and papers in his predecessor's hands. None of the moneys, however, which were received from the plaintiff were turned over to the defendant, but the defendant has had in his hands, at various times, moneys received for issuing liquor tax certificates, amounting in the aggregate to a sum largely in excess of plaintiff's claim.

Before the commencement of this action the plaintiff duly demanded of the defendant \$100, the excess claimed to have been paid for the liquor tax certificate issued to him as aforesaid.

Section 11, subdivision 1 of the Liquor Tax Law is as follows:

"Excise taxes upon the business of trafficking in liquors shall be of four grades and assessed as follows:

"Subdivision 1. Upon the business of trafficking in liquors to be drunk upon the premises where sold, or which are so drunk, whether in a hotel, restaurant, saloon, store, shop, booth or other place, or in any outbuilding, yard or garden appertaining thereto or connected therewith, there is assessed an excise tax to be paid by every corporation, association, copartnership or person engaged in such traffic, and for each such place where such traffic is carried on by such corporation, association, copartnership or person, if the same be in a city having by the last State census a population of fifteen hundred thousand or more, the sum of eight hundred dollars; * * * if in a village having by said

census a population of less than five thousand but more than twelve hundred, the sum of two hundred dollars; if in any other place the sum of one hundred dollars." * * *

By the last paragraph of subdivision 4 of said act it is provided:

"When the population of a city or village is not shown by the last State census, it shall be determined for the purposes of this act by the last United States census, and if not so shown by reason of the incorporation of a new city or village, the State Commissioner of Excise is authorized and directed to cause an enumeration of the inhabitants to be taken in such city or village." * * *

It appears by the evidence in this case that the population of the village of Herkimer was not separately returned and stated by the last State census or by the last United States census referred to in the above act, but the village of Herkimer was reported and stated in each census as a part of the town of Herkimer, and it appears that there was no separate enumeration of the inhabitants of the village, but the enumeration in each case was of the entire town of Herkimer. So that there is no statement in either census which shows the population of the village of Herkimer separately. The population of the entire town of Herkimer is shown by the last State census to be 5,150, and consequently, if the population of the village was not at least 1,200, the population of the town would be at least 3,950.

We think that the court may take judicial notice of the fact that the population of the town of Herkimer, outside of the village of Herkimer, at the time of the taking of the last State census, was not 3,950, and, therefore, that the population of the village of Herkimer at that time, as shown by the last State census, was in excess of 1,200.

It was conceded upon the trial that, at the time the liquor tax certificate was applied for by the plaintiff and issued to him by the then county treasurer, the actual population of the village of Herkimer was at least 4,000, and such a number as to entitle the county treasurer to demand the sum of \$200 from the plaintiff, the amount which he received. At the time the money was paid to the then county treasurer by the plaintiff, no question was raised as to the population of the village of Herkimer, and no question was made as to the amount of tax which should be paid by the plaintiff, but it may be held, notwithstanding that fact,

that such payment by the plaintiff was not voluntary, it having been demanded of him and paid by him pursuant to statute.

It is urged on behalf of the plaintiff that, because the population of the village of Herkimer is not separately stated in the last State census, nor in the last United States census, and because it does not appear, by separate statement, that the population of the village of Herkimer was more than 1,200 at the time the certificate in question was issued to the plaintiff, the county treasurer should only have demanded and received for the certificate in question the sum of \$100, notwithstanding the population of the village was actually 4,000, and largely in excess of the number required to entitle such county treasurer to demand and receive the sum of \$200 for such certificate.

In effect, the plaintiff concedes that he paid the exact amount which he should have paid for the right to engage in the liquor business in a village having a population of the village of Herkimer, but insists that, because such population was not shown by a separate statement in either census referred to, he should pay upon the basis that the population was less than 1,200, although conceding that it was in fact 4,000. It is not believed that such is the proper construction of the statute in question. It is specifically provided by the act referred to that in villages having a population of more than 1,200, \$200 must be paid for a liquor tax certificate which will entitle a person to engage in the liquor business in such village.

As a ready means of ascertaining the population of a municipality where it is close or in dispute, it is provided by said act that recourse may be had to the last State or United States census. It does not follow that where the population of a village is well known, and is conceded to be largely in excess of the number which would require the payment of \$200 for a liquor tax certificate, that a less sum should be paid because such population is not separately stated in the census referred to. Such a construction of the statute would be unreasonable and unjust, and would permit unjust discrimination as between villages, and there is no method, provided by the statute, by which such an unjust discrimination could be avoided, in case the contention of the plaintiff should prevail.

The last paragraph of subdivision 4 of the act only provides for a new enumeration of the inhabitants of a village where the population is not shown, by the last State census nor by the last

United States census, "by reason of the incorporation of a new city or village"; in that case the State commissioner of excise is authorized and directed to cause an enumeration of the inhabitants to be taken in such city or village.

So that, in the case at bar, if the contention of the plaintiff is to prevail, notwithstanding the population of the village of Herkimer is conceded to have been 4,000 at the time in question, notwithstanding the fact that the court must take judicial notice of such population, and notwithstanding the further fact that, from the last State census, it may clearly be ascertained that the population of the village of Herkimer was in excess of 1,200, applicants for liquor tax certificates in said village can only be required to pay upon the basis and upon the assumption that the population of said village was less than 1,200.

As before said, it is believed that such construction would be unreasonable and unjust. The plaintiff paid for the certificate issued to him exactly what he should have paid. He paid the amount, knowing what the population of the village was, or at least knowing that it was largely in excess of 1,200, and he is not entitled to recover back any part of the sum so paid simply because the population of said village is not separately stated in the last State census, nor in the last United States census.

It is unnecessary to consider any of the other questions raised by defendant's counsel. The plaintiff's complaint should be dismissed, with costs. Judgment is ordered accordingly.

Ordered accordingly.

Fourth Appellate Department, February, 1898. Reported. 25 App. Div. 428.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JAMES W. BAGLEY, Respondent, v. JOHN B. HAMILTON, as Treasurer of the County of Monroe, Appellant.

Liquor Tax Law—Construction of the exemption given to a "place" within 200 feet of a church or school, where liquor was sold therein on March 23, 1896, and the traffic was thereafter abandoned.

The exception contained in subdivision 2 of section 24 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312), providing that the prohibition therein imposed upon traffic in liquors within 200 feet of a building used exclusively as a church or

school, shall not apply to a place in which on March 23, 1896, "such traffic in liquors was actually, lawfully carried on," is not applicable to premises within 200 feet of a church in which the traffic in liquor, although carried on therein on March 23, 1896, was thereafter discontinued for a period of two months, at the end of which time a new tenant of the premises undertook to resume the traffic.

APPEAL by the defendant, John B. Hamilton, as treasurer of the county of Monroe, from an order of the Supreme Court, entered in the office of the clerk of the county of Monroe on the 11th day of October, 1897, directing the defendant as county treasurer to issue to the relator a liquor tax certificate.

This is a proceeding by writ of certiorari under section 28 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312) to review the action of the treasurer of Monroe county in refusing to issue a liquor tax certificate to the relator. The facts of the case, concerning which there is no dispute, are as follows, viz.:

On the 23d day of March, 1896, traffic in liquors was actually and lawfully carried on by the occupants of the premises in question, which are situate on the southeast corner of Reynolds street and Bronson avenue, in the city of Rochester, and within two hundred feet of a building occupied exclusively as a church. Such traffic was continued down to and including July 1, 1897, when it ceased and the premises have not since been lawfully used for that purpose.

On the 31st day of August, 1897, the relator leased the premises in question, intending to occupy and use them for the same purpose for which they had been occupied and used by the prior occupant, and to that end applied to the treasurer of Monroe county for a tax certificate on the 1st day of September, 1897. His application was in due form and accompanied by the required bond, but it was refused upon the ground that the premises for which a tax certificate was sought were within two hundred feet of a building used exclusively as a church.

Charles E. Bostwick and N. N. Stranahan, for the appellant.

Sol Wile, for the respondent.

ADAMS, J. It is obvious from a mere reading of the foregoing statement of facts that the sole question to be considered upon

this review is the construction which shall be given to certain provisions of subdivision 2 of section 24 of the Liquor Tax Law. This section, so far as its language is of any importance in this connection, reads as follows:

“ § 24. Traffic in liquors shall not be permitted:

“ 1. * * *

“ 2. * * * within two hundred feet of a building occupied exclusively as a church or schoolhouse; * * * provided, however that this prohibition shall not apply to a place which on the twenty-third day of March, eighteen hundred and ninety-six, was lawfully occupied for a hotel, nor to a place in which such traffic in liquors was actually, lawfully carried on at that date. * * * ”

While it is conceded that the relator's place of business is within two hundred feet of a building occupied exclusively as a church, it is nevertheless contended that he brings himself within the exception to the section just quoted by reason of the fact that the business of trafficking in liquors was lawfully carried on upon the same premises at the time the Liquor Tax Law went into operation; and the fact stated being true, such contention must prevail, unless the privilege granted by the exemption clause was lost in consequence of the abandonment of the business at this particular place for the period of two months subsequent to the time specified in the statute.

This statute was doubtless enacted under the police power of the State, and while its language should receive a just and reasonable construction, the object and intent of its enactment should not be lost sight of. The main object which the legislature had in view was, of course, to confine the traffic in liquors within certain limits and to surround it with well-defined restrictions. One of these restrictions is that the church or the school shall not be brought into too close proximity to the saloon; hence the limitation of two hundred feet. But while endeavoring to protect the church and school from the demoralizing influence of the saloon, the legislature was at the same time careful to recognize the fact that dealers in liquor might have certain vested rights which ought not to be interfered with, and, therefore, it enacted that where at the time the law went into effect a party was lawfully engaged in the sale of liquors at any particular place, such traffic might be continued at that place, although it was within the prohibitory terms of the statute

This exception was manifestly designed to protect parties who, under the sanction of former statutes, had incurred the trouble and expense of buying, renting or fitting up places in which to conduct the saloon business.

A provision similar to the one which we are now considering was contained in the act of 1892 (Chap. 401), as amended by chapter 480 of the Laws of 1893. It is claimed, however, that under that act the privilege was personal in its character, while under the present law it is one which is impressed upon the place, and not the individual.

This distinction seems to us somewhat forced, but whatever merit there is in it, it must be admitted that the concession, whether it be to the person or to the place, is one which is clearly an exception to the general policy of the law, and consequently it is one which should receive a strict interpretation. In a recent case it was said to be "a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers." (*Riggs v. Palmer*, 115 N. Y. 506, 509.)

And we have the very best authority for declaring that when the intention of the lawmakers is once ascertained, it becomes the duty of judges to give such a construction as shall repress the mischief and advance the remedy aimed at. (1 Kent, 465.)

Applying then the rule thus stated to the present case, it becomes our obvious duty to so construe the exceptional provision under consideration as that it shall conform if possible, to the general design and policy of the statute as a whole. We have stated what that policy is, and we think it only remains to show how easily it may be thwarted in order to demonstrate the fallacy of the relator's contention; for if an abandonment of the traffic in liquors at a particular place for the period of two months does not work a forfeiture of the privilege conferred by the statute, then an abandonment for a much longer period of time would not have that effect; and with the rule contended for once established, there would apparently be no limitation of time within which a party might claim the privilege of selling liquors at some particular place, provided he could show that somebody else was lawfully engaged in the same business at the same place on the 23d day of March, 1896. Certainly the

Legislature could not have intended that the protection sought to be given to our public schools and churches should thus prove to be of so little value. We do not wish to be understood as holding that mere change of proprietorship necessarily works a forfeiture of the privilege conferred by subdivision 2 of section 24; indeed, we can conceive of cases where the temporary abandonment of the sale of liquors incidental to such a change would be so brief as to constitute no appreciable interruption to the traffic. But where, as in the present case, the business of one proprietor is closed up and no resumption thereof attempted by his successor for sixty days, we think that, within the spirit of the law, the privilege which it grants must be regarded as surrendered.

The views to which we have thus given expression are, as we believe, not only in consonance with every principle of justice and propriety, but they are likewise in harmony with those expressed in numerous instances where a construction of this and similar statutes has been involved. (*People ex rel. Cairns v. Murray*, 148 N. Y. 171; *People ex rel. Gentilesco v. Excise Board*, 7 Misc. Rep. 415; *People ex rel. Sweeney v. Lammerts*, 18 id. 343; *affd.*, 14 App. Div. 628; *Matter of Ritchie*, 18 Misc. Rep. 341; *Matter of Zinzow*, Id. 653; *Matter of Korndorfer*, N. Y. L. J., Nov. 23, 1897.)

Our conclusion of the whole matter, therefore, is that the order appealed from should be reversed and the writ dismissed, with fifty dollars costs and disbursements to the appellant.

All concurred.

Order reversed and the writ dismissed, with fifty dollars costs and disbursements to the appellant.

Second Appellate Department, March, 1898. Reported. 26 App. Div. 564.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.* CONRAD
STOCK, Respondent.

**Liquor Tax Law—An offender against its provisions can not be sentenced to an imprisonment of one day for each dollar of the fine unpaid—
Discharge under a writ of habeas corpus.**

The provisions of sections 484 and 718 of the Code of Criminal Procedure, providing that a judgment which imposes a fine may also direct that the criminal be imprisoned until the fine be paid, for a term not to exceed one day for each dollar of the fine, are not applicable to a conviction under the Liquor Tax Law (Laws of 1896, chap. 112, § 34), which makes a sale of liquor by one not having a liquor tax certificate a misdemeanor, punishable by fine and imprisonment, but contains no specific authority to sentence the criminal to imprisonment for non-payment of the fine, the latter statute being designed to cover the whole subject, both prescribing the punishment and the manner in which the fine shall be collected.

Where in such a case a sentence of imprisonment has been imposed for the non-payment of the fine, the prisoner may be released under a writ of habeas corpus.

APPEAL by the plaintiff, The People of the State of New York, from an order of the Supreme Court, entered in the office of the clerk of the county of Dutchess on the 18th day of December, 1897, directing the sheriff of the county of Dutchess to discharge the defendant from his custody.

George Wood, for the appellant.

Charles A. Hopkins, for the respondent.

GOODRICH, P. J. The defendant, Stock, was convicted in the county court of Dutchess county on December 13, 1897, under section 34 of the Liquor Tax Law (Laws of 1896, chap. 112), of selling liquor without having obtained a liquor tax certificate, and was sentenced to pay a fine of \$300, and in default of payment, to stand committed to the county jail for a term not to exceed one day for each dollar of the fine. On December eighteenth he was discharged under a writ of habeas corpus, the order being based upon the theory that the statute did not authorize imprisonment for non-payment of the fine. Two questions arise: *First*, the jurisdiction of the county court to

impose the sentence of imprisonment, and *second*, the right of the court to review it upon a writ of habeas corpus.

Section 34 of the Liquor Tax Law (5 R. S. [9th ed.] 3492) provides as follows:

“ § 34. Penalties for violation of this act.—1. Any corporation, association, copartnership or person trafficking in liquors who shall neglect or refuse to make application for a liquor tax certificate or give the bond, or pay the tax imposed as required by this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than two hundred nor more than two thousand dollars, provided such fine shall equal at least twice the amount of the tax for one year, imposed by this act upon the kind of traffic in liquors carried on, where carried on, and may also be imprisoned in a county jail or a penitentiary for the term of not more than one year.”

This section provides for the infliction of a fine of not less than \$200, and, in addition, imprisonment in the county jail for not more than one year. It does not provide for a commitment to the county jail for a term not to exceed one day for each dollar of the fine, but it is claimed that as the Liquor Law declares the act a misdemeanor, it falls within the provisions of sections 484 and 718 of the Code of Criminal Procedure, which read:

“ § 484. *Judgment to pay fine* * * * A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every one dollar of the fine.”

“ § 718. *Judgment of imprisonment, until fine be paid; extent of imprisonment.*—A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every one dollar of the fine.”

The question arises whether sections 484 and 718 are applicable to the imprisonment mentioned under section 34 of the Liquor Tax Law, which was passed subsequently to the cited sections of the Code of Criminal Procedure.

Section 36 of the Liquor Tax Law (5 R. S. [9th ed.] 3494) provides that the fine must be docketed as a judgment against the person convicted, in favor of the State Commissioner of Excise, and if the judgment shall not be paid within five days after the sentence, the clerk of the county shall issue an execution against the property of the judgment debtor, and that the levy thereunder

shall take precedence of any and all liens, mortgages, conveyances or incumbrances, on the property of the judgment debtor, subsequent to the docketing of the judgment; and that no property of the debtor shall be exempt from such levy and sale, and that where the debtor has furnished the bond authorized by section 18 of the act, the amount of the judgment may be collected from the sureties on such bond.

The learned judge at Special Term held that the imposition of a fine merely was in no sense a criminal punishment, as the statute provided that the debtor might be punished by imprisonment in addition to the fine, and that he could not be imprisoned simply for non-payment of the fine. I think this view is correct.

The 34th section of the Liquor Tax Law provides a specific punishment for the offense therein defined, and the County Court could resort alone to it and section 36 for the punishment and power to enforce sentence. It contains specific directions for sentence for the offense and must be strictly construed. No specific authority can be found in its provisions for imprisoning the defendant for non-payment of the fine. In this view of the completeness of the statute within itself and of all matters relating to offenses thereunder, I am further confirmed by its provision providing for the giving of a bond by each applicant for a tax certificate. It is true that the offense for which the petitioner was convicted was that he neither applied for nor obtained the certificate; but I refer to the bond simply for the purpose of illustrating the reach of the statute.

Still further confirmation of this view is found in *Matter of N. Y. Institution* (121 N. Y. 234, 239), where the court held "that where prior laws are revised and consolidated into a new act, such act is to be deemed to contain the entire law upon the subject, and that a prior provision of law which is dropped, is to be regarded as repealed. In *Ellis v. Paige* (1 Pick. 43) it is said: 'It is a well-settled rule that when any statute is revised, or one act formed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the Legislature gross carelessness or ignorance, which is altogether inadmissible.' In *Bartlett v. King* (12 Mass. 537) it was held that a subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, upon

principles of law, as well as in reason and common sense, operate to repeal the former."

There is authority for holding that, under statutes which define certain offenses as misdemeanors, a writ of *levari facias* may be issued to enforce the payment of a fine, but these cases arose under statutes which did not contain any specific method of enforcing the collection of the fine.

This subject was before the court in the case of *People ex rel. Gately v. Sage* (13 App. Div. 135), where, on conviction for assault in the second degree, the prisoner was sentenced to be imprisoned in the State prison and to pay a fine of \$730, and, in default of payment of the fine, that he be further imprisoned in said State prison until the fine was paid, not exceeding 730 days. This sentence was pronounced under section 221 of the Penal Code, which provides that the crime shall be punishable "by imprisonment in a penitentiary or State prison for a term not exceeding five years, or by a fine of not more than one thousand dollars, or both." In this section there is no special provision for imprisonment in default of the payment of the fine, but this is supplemented by section 484, above cited, and this court (p. 137) said: "If the judgment cannot direct that the defendant stand committed, after the expiration of five years, till the fine be paid, the provision that he may both be imprisoned for five years and fined \$1,000 is rendered nugatory."

In the case at bar, however, there is a special provision for the enforcement of the fine, and this differentiates it from the *Sage* case.

Turning now to the opinion in *Colon v. Lisk* (13 App. Div. 195, 204; affd., 153 N. Y. 188), referred to in *People v. Sage*, (*supra*), this court held that, by the common law, the writ of *levari facias* to enforce the payment of a fine, was issuable by the common law on the ground that "it was an attribute of sovereignty authorizing the levy for a debt due to the crown by the united process against the body, the lands and goods of the defendant." This action was brought under the statute forbidding trespassing on oyster beds (Chap. 974, Laws of 1895, as amended by chap. 383, Laws of 1896). The statute declared that any person who violated its provisions should be guilty of a misdemeanor. There was in this statute no provision for the issuing of an execution to enforce the payment of the fine, although the vessel and property used in the commission of the offense were made liable

to seizure and sale. As the statute declared the offense a misdemeanor, recourse must be had to the sections of the Criminal Code, already cited (484 and 718), and to section 15 of the Penal Code, which reads: "A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this Code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than five hundred dollars, or by both."

The case at bar again differs from this case in the important fact that specific provision is made in the Liquor Tax Act for the collection of the fine. The personal liberty of the prisoner being involved, I think the statute must be strictly construed, and that it does not authorize any commitment of a prisoner for non-payment of the fine imposed.

Second. I have no doubt that the question involved may be properly adjudicated upon a writ of habeas corpus, for the reason that the Trial Court had no jurisdiction or power, under the Liquor Tax Law, to impose a sentence of imprisonment for non-payment of the fine.

In the case of *People ex rel. Tweed v. Liscomb* (60 N. Y. 559) the court held that where the record shows that the judgment is not merely erroneous, but is such as could not, under any circumstances, or upon any state of facts, have been pronounced, the case is not within the exemption of the Habeas Corpus Act, excluding from its benefits persons committed by virtue of a judgment or decree of a competent tribunal, or if it appear that the judgment is in excess of that which by law the court had power to make, it is void for the excess, and can be so declared, and that the prisoner was entitled to discharge under habeas corpus.

A similar doctrine was announced by the Supreme Court of the United States in *Ex parte Lange* (85 U. S. 163). In that case the court below had imposed a fine *and* imprisonment, where it had power only to impose a fine *or* imprisonment, and the fine had been paid. The court held that the prisoner, having paid the fine, was entitled to discharge under habeas corpus, and that the judgment of the court below, that is, the fine, having been executed so as to be a full satisfaction of one of the alternative

penalties of the law, the power of that court as to that offense was at an end.

In the present proceeding the judgment or the sentence of fine, as shown by the record, was pursued to its end by the entry of the judgment against the defendant therein and the issuance of an execution for the collection thereof. Under these circumstances, the defendant was not held or detained by virtue of the judgment or decree of any competent tribunal, in which case the writ of habeas corpus would not lie.

Since the foregoing was written, an opinion has been published in the case of *People ex rel. Bedell v. Kinney* (24 App. Div. 309), where a party was imprisoned under a similar sentence, and a writ of habeas corpus was issued before the expiration of six months' imprisonment. The Appellate Division of the fourth department reversed the order discharging the relator from imprisonment, but only on the ground that the writ was issued before the expiration of term of imprisonment, and was, therefore, premature, without referring to the question herein considered. Mr. Justice WARD, however, wrote a dissenting opinion, in which he discussed the question involved in the foregoing opinion and arrived at a conclusion similar to my own.

The order of the Special Term should be affirmed.

All concurred.

Order discharging relator affirmed.

Supreme Court, Erie Special Term, March, 1898. Reported 23 Misc. 63.

THE PEOPLE ex rel. RICHARD W. LARKIN, Relator, v. CARLOS A. HULL, as County Clerk of Genesee County, Respondent.

Liquor Tax Law—A special agent subpoenaed by a district attorney is entitled to full witness fees.

A special agent of the state excise department, appointed under the Liquor Tax Law (Laws of 1896, chap. 112), is not bound to take any part in the prosecution, by a district attorney, of an alleged violation of the statute; and, when duly subpoenaed to testify as a witness before the grand jury as to a violation which he has investigated, is entitled to his legal fees and the court will compel the proper county clerk to certify to the days of attendance and the number of miles traveled.

MOTION by the relator for a peremptory writ of mandamus.

J. M. Congdon, for relator.

Safford E. North, for respondent.

WHITE, J. The relator is a special agent in the department of excise in this State, and the respondent is county clerk of Genesee county.

In the discharge of his duty, the relator investigated an alleged violation of the Liquor Tax Law in Genesee county, and made a complaint against the alleged offender, to the district attorney of that county, which complaint was presented by the district attorney to a grand jury.

The district attorney subpoenaed the relator at New York city to appear and testify as a witness before the grand jury, and pursuant to the subpoena the relator traveled from New York to Batavia for that purpose and testified before the grand jury. His fees, as such witness, if he is entitled to any, amount to \$34.30, and it is the intention of the relator to pay over to the State of New York the amount of those fees if he shall receive them.

The relator requested the respondent to certify to the number of days he, the relator, attended before the grand jury and to the number of miles he had traveled to so attend, which the respondent refuses to do, upon the ground that the relator is not entitled to charge or receive fees or mileage as a witness for attendance before the grand jury, within the meaning of sections 609 and 616 of the Code of Criminal Procedure; the respondent's contention in that behalf being that the Liquor Tax Law imposes upon the relator, as a special agent of the excise department, the duty so to attend and testify, at the expense of that department.

It is understood to be the universal practice or custom now of counties to pay witnesses for the People who are not special agents in the excise department, situated as Larkin was, when subpoenaed by the district attorney of Genesee county, that is, witnesses who come from another county and travel a considerable distance to attend and testify before the grand jury, fees and mileage for so attending and testifying; and for the purposes of this case it is assumed that that practice or custom is warranted by section 616 of the Code of Criminal Procedure, and that the proceeding before the grand jury is the trial of a criminal action

within the meaning of that provision of the statute. No objection to that construction of it is made by the respondent.

The refusal of the respondent, therefore, to give the certificate asked for by the relator, he having made proof of the fact of his attendance and the number of miles he traveled for that purpose in the manner prescribed by law, must be justified, if at all, by the Liquor Tax Law itself.

The object, sought to be attained by that law, is primarily to tax and regulate the traffic in liquors in such a manner as to insure uniformity in the application and enforcement of the Excise Law in place of a great diversity in those respects, which prevailed before its enactment by reason of sympathies and prejudices which existed in different localities and which, it is generally conceded, many times caused acts of favoritism and injustice on the part of the officials charged with its administration.

The only provisions contained in the Liquor Tax Law which can be said to bear upon the question presented for solution here, are found in sections 10, 35, 36, 37, 38 and 42.

Such provisions are, in substance, that special agents shall be appointed by the state commissioner, that they shall receive a salary of \$1,200 a year, payable in monthly installments, together with such necessary expenses as they may incur by direction of the State commissioner in the performance of the duties of their office.

The relations between the commissioner and those agents are made confidential by the statute, and they are required, under his direction, to *investigate* all matters relating to the collection of liquor taxes and penalties under the act, and in relation to the compliance with law by persons engaged in the traffic in liquors; they may also investigate other matters in connection with the sale of liquor, and, with certain county and municipal officers, are required to notify district attorneys of violations of the statute which may come to their knowledge; that the offense investigated by the special agent, as far as we are now interested in that question, shall be prosecuted by indictment by a grand jury of the county in which the crime was committed, and all fines and costs imposed and penalties recovered by civil actions are to be paid, in the first instance, to the treasurer of the county where the offender is prosecuted and convicted, or penalties are collected, and are then apportioned and divided between the State and county as provided by the law.

Criminal actions are, generally speaking, local, and the expenses thereof are borne by the counties where they are tried. There is no provision either in the Liquor Tax Law or any other statute, imposing upon special agents of the excise department any duty or obligation to appear as witnesses before grand juries or at all, otherwise than under and by virtue of subpoenas. In that respect they are situated precisely like other witnesses and are compelled to so attend and testify in the same manner. I am of the opinion that, if the legislature had intended to place such an obligation upon such special agents, the law would have so provided.

There is an entire absence of statutory law making it a duty of a special agent to take any part in the prosecution of violations of the Liquor Tax Law, after he shall have investigated the matter and made a report to the district attorney. In that respect the duty of a special agent is exactly the same as that of other county and municipal officers, as has already been said. The only officer or person competent to enforce the law by criminal action is the district attorney.

The fact that the relator, by his original investigation and report of the Petrie case, thereby made himself an indispensable witness for the People; or that he now *understands* that he is obliged to turn over to the State the fees, if any, which he may receive, does not seem to me to be relevant to this discussion. There seems to be no basis for such an understanding, and, therefore, it is but an erroneous conception of the law.

Of course, if, as the respondent contends, the State or excise department has paid the expenses of the relator in going to Batavia from New York to testify, and the county is required to pay the same expense to the relator, he will receive a double payment of those expenses; but, as I construe the law, that is not the case. The expense of a witness once paid by the county to the witness, should not, and, it is assumed, will not, be again paid to him by the State or by the excise department. The *expense* incurred and paid by a witness in such a case is not such as section 10 of the Liquor Tax Law provides for, because it is not an expense incurred by direction of the State commissioner, within the meaning of that section of the statute.

The State commissioner not only does not direct or command the special agent to appear and testify before the grand jury but would have no right or authority to do so or to interfere in any way

to prevent an exact and prompt obedience to a subpoena served upon a special agent in such a case.

The right to a fee for attendance is given expressly by statute to all witnesses alike who attend and testify before a grand jury.

In my opinion the writ asked for should be granted.

Writ granted.

Fourth Appellate Department, March, 1898. Reported. 27 App. Div. 527.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. EDWIN G. S. MILLER, Respondent, v. HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Appellant.

Liquor Tax Law—Effect of a violation of the law by one partner, after an assignment of the certificate as collateral to a loan, and the issue of a rebate tax certificate—1896, chap. 112, § 25, and 1897, chap. 312.

Where a liquor tax certificate, issued to a firm and assigned as security for a loan, is surrendered, and a rebate tax certificate is issued to the assignee, a violation of the Liquor Tax Law, by one member of the firm within thirty days thereafter, and before the rebate becomes due and payable, deprives the assignee of the right to the rebate.

APPEAL by the defendant, Henry H. Lyman, as State Commissioner of Excise of the State of New York, from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Erie on the 9th day of February, 1898, granting a peremptory writ of mandamus, requiring the State commissioner of excise to issue orders for the payment of \$416.67 on account of the surrender of a liquor tax certificate issued to the relator's assignors.

John G. Floss and Henry Stauber were partners under the firm name of Floss & Stauber, and engaged in the business of selling liquors at 359 Washington street, Buffalo. April 30, 1897, they executed an instrument to Edwin G. S. Miller wherein it is recited that they had applied for a liquor tax certificate and that Miller had advanced money wherewith to pay for it, and that in consideration thereof they assigned to him the certificate, with the right to collect all sums that might be due thereon upon its surrender.

May 1, 1897, a liquor tax certificate, No. 11985, was issued to

Floss & Stauber, authorizing them to sell liquors at 359 Washington street, Buffalo, for which they paid \$500. July 1, 1897, Floss & Stauber, through Miller, applied to the deputy commissioner of excise for Erie county for leave to surrender the tax certificate and have the proportionate part (five-sixths), \$416.67, of the amount paid for the certificate refunded, and on that day he issued the duplicate receipts provided for by the 25th section of the Liquor Tax Law. (Laws of 1896, chap. 112, as amended by chap. 312 of the Laws of 1897.)

July 19, 1897, Henry Stauber was indicted in Erie county for having, on July 11, 1897, violated the Liquor Tax Law. July 21, 1897, he was arrested, and July twenty-ninth he was arraigned on the indictment and pleaded not guilty.

When this proceeding was begun, December 17, 1897, Stauber had not been tried on the indictment.

Royal R. Scott, for the appellant.

Tracy C. Becker, for the respondent.

FOLLETT, J. But a single question is presented on this appeal. In case a liquor tax certificate issued to a firm and assigned as security for a loan is surrendered, and a rebate tax certificate issued to the assignee, does the violation of the Liquor Tax Law by one of the firm within thirty days thereafter, and before the rebate becomes due and payable, deprive the assignee of the right to the rebate?

Two kinds of assignments of liquor tax certificates are authorized: (1) An absolute sale of a certificate as provided for by the 27th section of the act, which authorizes the assignee to carry on the business which his assignor was authorized to carry on, provided the assignee makes a new application, gives a bond, and the assignment is approved by the officer who issued the tax certificate. (2) An assignment of a certificate as collateral security (*People v. Durante*, 19 App. Div. 292; *Niles v. Mathusa*, 20 id. 483; *Koehler & Son Co. v. Flebbe*, 21 id. 210), under which the assignee is not authorized to carry on the business in the place of the person to whom the certificate was issued who continues to carry it on in the same manner as before the assignment was made.

The assignment in the case at bar is the second kind.

The right of a person under a certificate is prescribed by the

statute under which it is issued, and whoever acquires an interest therein takes it subject to the provisions of the statute, among which provisions is one that if a person to whom a certificate is issued, is adjudged to have violated the statute, the certificate becomes null and void, and all right to surrender the same and receive the rebate is lost. No exception is made in favor of an assignee, who takes the certificate subject to all the restrictions and conditions of the statute.

By the 25th section it is provided that in case a certificate is surrendered, and a rebate tax receipt is issued, and within thirty days thereafter the person to whom the tax certificate was issued violates the provisions of the act, all right to the rebate is forfeited; and it is further provided by the same section that, in case a prosecution is begun within thirty days, the right to the rebate shall be suspended until the prosecution is determined, and if decided in favor of the licensee the rebate is to be paid, but if against him the right is lost.

It cannot, I think, be successfully contended that in case a certificate is issued to a firm and one member is adjudged guilty of violating the statute, the certificate remains valid in the hands of the firm and it has a right to the rebate. Were this the rule, one member of a firm could violate the statute at will, and so long as both did not, the right of the firm to the certificate and rebate would be perfect, and the object of the statute, which is to secure an observance of the law, would be defeated. Such was not the purpose of the statute. Violations of the law, by a member of a firm, have the same effect on the certificate and upon the right to receive payment on the rebate receipts as violations by all the partners; and it makes no difference whether such violations are committed before or within thirty days after the certificate is surrendered, and the rebate receipt given. In either case, the right of the firm to the rebate is gone, as is also the right of an assignee, who takes his assignment with notice of all the provisions of the statute, and he is not protected by the fact that he has not personally violated the statute.

The order is reversed, with costs, and the writ dismissed, with fifty dollars costs.

All concurred.

Order reversed, with costs, and the writ dismissed, with fifty dollars costs.

Fourth Appellate Department, March, 1898. Reported. 27 App. Div. 561

In the Matter of the Petition of FRANK PLACE, Appellant, for an Order Revoking and Canceling the Liquor Tax Certificate of FRANK MATTY, Respondent.

Intoxicating liquor—A license, to sell liquor within 200 feet of a church, issued under the Excise Law of 1892, is a personal privilege and not assignable—**Status of the assignee under that act and the Liquor Tax Law**—Connecting a building within 200 feet of a church with a liquor saloon outside of such limit—**Construction of the exemption given to hotels in this respect**—What are not hotel "bedrooms" within the Liquor Tax Law.

Under section 43 of the Excise Law of 1892 (Chap. 401), as amended by chapter 480 of the Laws of 1893, which amendment went into effect the 29th day of April, 1893, providing that "no person or persons, who shall not have been licensed prior to the passage of this act, shall hereafter be licensed to sell strong or spirituous liquors, wines, ale and beer in any building not used for hotel purposes, and for which a license does not exist at the time of the passage of this act, which shall be on the same street or avenue and within two hundred feet of a building occupied exclusively as a church or schoolhouse," the board of excise of a city had no power, on March 4, 1893, to consent to the assignment of a license expiring May 2, 1893, by the licensee of premises "not used for hotel purposes," situate "within two hundred feet of a building occupied exclusively as a church or schoolhouse," to a tenant of the licensee.

Semble, that the privilege created by section 43 was a purely personal one.

The assignee of the license, not having been legally licensed to sell liquors in the place in question on April 29, 1893, could not be subsequently legally licensed to sell liquors at that place under said amended section 43, nor under chapter 112 of the Laws of 1896.

A person holding a license, or a liquor tax certificate, for premises just outside of the 200-foot limit can not, by renting an adjoining building, which is within 200 feet of a church, and cutting an opening between the buildings, become entitled to a license to sell liquor in the buildings so united, the entrance to which is within 200 feet of the church.

The provision of subdivision 2 of section 24 of chapter 112 of the Laws of 1896, declaring that the prohibition against sales of liquor within 200 feet of a church "shall not apply to a place which is occupied for a hotel" only operates to exempt a place which was used for a hotel on March 23, 1896, when the act took effect, and not a place which was thereafter being used as a hotel when the tax certificate was granted.

What rooms are not "bedrooms" within the requirements of subdivision 2 of section 31 of chapter 112 of the Laws of 1896, defining the term "hotel," as used in that act, considered.

APPEAL by the petitioner, Frank Place, from an order of the Supreme Court, made at the Onondaga Special Term and entered in the office of the clerk of the county of Onondaga on the 7th day of June, 1897, denying the petitioner's application to have canceled a liquor tax certificate issued to Frank Matty.

S. B. Mead, for the appellant.

James Devine, for the respondent.

FOLLETT, J. This proceeding was begun December 23, 1896, by Frank Place, special agent of the Commissioner of Excise of this State, to procure the revocation of a liquor tax certificate issued July 1, 1896, to Frank Matty, authorizing him to sell liquors at Nos. 301 and 303, corner of South Warren and East Fayette streets in the city of Syracuse, on the ground that material statements in his application for such certificate were false, and that he was not entitled to receive and not entitled to hold such certificate. An order was granted by a justice of the Supreme Court requiring Frank Matty to show cause why the prayer of the petition should not be granted. He appeared and answered, and upon the issue joined a trial was had which resulted in a dismissal of the proceedings.

An entrance to this alleged hotel is on East Fayette street, and is conceded to be within two hundred feet of St. Paul's church, a building occupied exclusively as a church and situate on that street. The real estate is owned by Joseph Dunfee, who occupied some portion of it before March 4, 1893. June 10, 1892, a license, No. 376, was granted pursuant to chapter 401 of the Laws of 1892, to Joseph Dunfee, the owner of the premises, to sell liquors at No. 301 or No. 303, or at both numbers, the particular number or place not being identified. Whether it was a license to sell as a storekeeper, as a druggist, or to sell spirituous and malt liquors to be drank on the premises, or to sell malt liquor only to be drank on the premises, does not appear. This license expired May 2, 1893. March 4, 1893, Frank Matty, the respondent, leased of Joseph Dunfee some portion of these premises, and evidently the portion in which Dunfee was then engaged in selling liquors. May 2, 1893, a license was granted to Frank Matty by the board of excise, authorizing him to sell liquor on these premises for one year, which license was renewed in 1894 and in 1895. What

kind of licenses these were does not appear, nor does it appear to which street number they related. July 1, 1896, Frank Matty opened both numbers, or a portion of them, as a hotel, and on that day received from the county treasurer a tax certificate authorizing him to sell liquors as a hotelkeeper. Before this date no hotel had ever been kept on the premises, which were not so occupied on the 27th day of June, 1896, when Frank Matty verified his application for the tax certificate.

It is contended that the county treasurer was authorized to issue the liquor tax certificate of July 1, 1896, and that it is valid on two grounds:

(1) That traffic in liquors was "lawfully carried on" at Nos. 301 and 303, March 23, 1896, when the Liquor Tax Law took effect.

(2) That Nos. 301 and 303 were "occupied for a hotel" July 1, 1896, when the tax certificate was issued.

Before discussing this case the statutes bearing on it will be collated. They are as follows:

Section 43 of the Excise Law (Laws of 1892, chap. 401), which took effect April 30, 1892, provided:

"§ 43. No person or persons, who shall not have been licensed prior to the passage of this act, shall hereafter be licensed to sell strong or spirituous liquors, wine, ale and beer, in any building not used for hotel purposes, and for which a license does not exist at the time of the passage of this act, which shall be on the same street or avenue and within two hundred feet of a building occupied exclusively as a church or a schoolhouse. The measurements shall be taken between the principal entrances of the buildings used for such church or school purposes and the place for which an application for a license has been made."

This section was amended by chapter 480 of the Laws of 1893, which took effect April 29, 1893, so that it provided:

"§ 43. No person or persons, who shall not have been licensed prior to the passage of this act, shall hereafter be licensed to sell strong or spirituous liquors, wines, ale and beer, in any building not used for hotel purposes, and for which a license does not exist at the time of the passage of this act, which shall be on the same street or avenue and within two hundred feet of a building occupied exclusively as a church or schoolhouse. The measurements shall be taken from the center of the nearest entrance of the building used for such church or school purposes to the center

of the nearest entrance of the place for which an application for a license has been made; provided, however, that a board of excise may, in its discretion grant permission in the manner herein provided, to transfer a license from premises within the limits above mentioned to other premises within said limits, but at a greater distance from the principal entrance of a church or school."

Section 24 of chapter 112 of the Laws of 1896 (the Liquor Tax Law), which took effect March 23, 1896, provided:

"§ 24. Traffic in liquor shall not be permitted * * *

"2. Under the provisions of subdivision one of section eleven of this act, in any building, yard, booth or other place which shall be on the same street or avenue and within two hundred feet of a building occupied exclusively as a church or a schoolhouse; the measurements to be taken from the center of the nearest entrance of the building used for such church or school to the center of the nearest entrance of the place in which liquor traffic is desired to be carried on; provided, however, that this prohibition shall not apply to a place which is occupied for a hotel, nor to a place in which such traffic in liquors is actually lawfully carried on when this act takes effect, nor to a place which at such date is occupied, or in process of construction, by a corporation or association which traffics in liquors solely with the members thereof, nor to a place within such limit to which a corporation or association trafficking in liquors solely with the members thereof when this act takes effect may remove; provided, however, such place to which such corporation or association may so remove shall be located within two hundred feet of the place in which such corporation or association so traffics in liquors when this act takes effect."

This section was amended by chapter 312 of the Laws of 1897 (which took effect April 20, 1897), but the amendment does not relate to the case at bar, as the transactions all occurred before that date.

This appeal will first be discussed on the respondent's theory that Nos. 301 and 303 were both lawfully occupied for the traffic in liquors by him and by his predecessor from June 10, 1892, to July 1, 1896, though the evidence, which will be hereinafter referred to, tends strongly to show that but one of these numbers was so occupied, which one was more than 200 feet from St. Paul's Church.

Section 43 of chapter 401 of the Laws of 1892, as amended by chapter 480 of the Laws of 1893, was construed in *People ex rel. Cairns v. Murray* (13 Misc. Rep. 522; revd., 148 N. Y. 171). In that case No. 700 Third avenue, in the city of New York, had been continuously used for the sale of liquors for more than forty years before April 6, 1895, under licenses granted by the board of excise of that city. Thomas B. Nugent was engaged in the sale of liquors at that place under a saloon license, which expired April 6, 1895. Prior to this date Thomas Cairns, the relator, purchased of Nugent his business and license. In 1895 St. Agnes' Church erected a building occupied exclusively by St. Agnes' Parochial School on Third avenue and within 80 feet of the saloon. April 19, 1895, Cairns applied for a license to sell liquors at No. 700, which was refused by the board of excise, on the ground that the saloon was on the same street and within 200 feet of the building, and that the applicant then held no license to sell at that place. The board's decision was reviewed on certiorari by the Superior Court and reversed. An appeal was taken to the Court of Appeals, which reversed the judgment of the Superior Court and affirmed the determination of the board of excise. It was held by the Court of Appeals that the exception in amended section 43, above quoted, applied only to a person who held a license to sell liquors within the prescribed distance on the 29th of April, 1893, and that it did not embrace the successor of a person who had held such a license; that the privilege created by the section was purely a personal one, and that it did not apply to a place within the prescribed distance of a school even though the applicant held a saloon license to sell liquor in another part of the city.

June 10, 1892, a license, No. 376, was granted to Joseph Dunfee to sell liquors at Nos. 301 or 303, or at both, which license expired May 2, 1893. Whether the license was to sell spirituous and malt liquors to be drank on the premises, or to sell malt liquors only to be drank on the premises, or to be sold in small quantities, but not to be drank on the premises, or whether it was a druggist's license, does not appear. March 4, 1893, Frank Matty entered into possession of one or both numbers, under a lease from the owner, which he has ever since continued to occupy. Whether the license granted to Joseph Dunfee June 10, 1892, was transferred by him to Frank Matty with the consent of the board of excise of the city of Syracuse on or about March 4, 1893, was

a disputed fact. The records of the board of excise could not be found and the license was not presented, but several persons testified that the license was so transferred on or about March 4, 1893, and the justice who tried this proceeding so found, which finding will not be disturbed by this court.

The first question presented is whether this transfer was authorized by the statutes then in existence. Under the decision of the Court of Appeals before referred to, it is apparent that the board of excise had no power to grant at that date a license to Frank Matty to sell liquors within 200 feet of the church. What the board could not do directly it could not accomplish indirectly. It not being within the power of the board to authorize Frank Matty to sell liquors at that place, by an original license issued to him, it was not within its power to grant this privilege by consenting to an assignment of a license to a person not authorized to receive one. He was not a person who could be licensed to sell at that place. This license, which expired May 2, 1893, conferred no right on Frank Matty to sell liquors at that place. May 2, 1893, this illegally assigned license expired and Frank Matty received a new license for the sale of liquors, at that place. Amended section 43, which took effect April 29, 1893, was then in force. The words "licensed to sell," as construed by the decision referred to, mean legal license to sell, and under the amended section Frank Matty, not having been legally licensed to sell liquors at that place prior to April 29, 1893, could not be legally licensed to sell liquors at that place under the amended section. (*People ex rel. Cairns v. Murray, supra; Matter of Zinzow*, 18 Misc. Rep. 653.) The same rule applies to the subsequent licenses alleged to have been granted in 1894 and 1895 under the Excise Law of 1892 as amended, so it follows that Nos. 301 and 303 were not a place in which the traffic in liquors was actually and lawfully carried on March 23, 1896, when the Liquor Tax Law took effect. This being so, the county treasurer had no power to issue a tax certificate authorizing Frank Matty to engage in the sale of liquors at this place as a keeper of a hotel. It should be noted that under the Liquor Tax Law the prohibition applies to *place* instead of to *person*.

Thus far the appeal has been discussed on the theory that the licenses issued prior to the tax certificate were to sell liquor at Nos. 301 and 303. Frank Matty testified that when he went into possession his premises were more than 200 feet from St. Paul's

Church, and that he afterwards added to the premises first occupied by him a 22-foot store, which brought the entrance to his place within 146 feet or 148 feet of the entrance of the church. He also testified that he began paying additional rent for his enlarged place of business June 1, 1896, and from this evidence it is inferable that prior to the date of the present tax certificate he had no license to sell liquor within 200 feet of the church and that no license had been granted to sell liquor at both numbers—301 and 303.

I think it cannot be successfully contended, under any of these acts, that, in case a license existed authorizing a person to sell liquor just outside of the prescribed limits, he can, by renting an adjoining building within 200 feet of a church and cutting an opening between them, become entitled to a license to sell liquors in the buildings so united, the entrance to which is, as in this case, within less than 200 feet of a church.

It is contended that July 1, 1896, Nos. 301 and 303 were occupied for a hotel, and, therefore, the tax certificate is valid. It is said that the verb "is" in the following clause, "that this prohibition shall not apply to a place which is occupied for a hotel," does not relate to the date when the act took effect, but to the date when a certificate is issued, and that the words should be interpreted to mean, "is or shall be occupied for a hotel." Under this interpretation a hotel could at any time after the law took effect be erected or opened within 200 feet of a school or church and the keeper obtain a tax certificate. Such, I think, was not the intention of the Legislature. By chapter 312 of the Laws of 1897, this subdivision was amended so it now reads: "That this prohibition shall not apply to a place which on the twenty-third day of March, eighteen hundred and ninety-six, was lawfully occupied for a hotel."

This is a legislative interpretation of the words first quoted. It was not the intention of the Legislature to authorize the sale of liquors at any place within 200 feet of a church which should thereafter be occupied as a hotel, but simply to authorize sales to be continued on premises legally occupied as a hotel or legally used for the sale of liquors March 23, 1896, when the act took effect. As before stated, it is conceded that the premises were never occupied as a hotel until July 1, 1896. The provision in respect to churches and schools is an exception to the general policy of the act, which is not a tax law, but is a law to regulate

and control traffic in liquor. (*People ex rel. Einsfeld v. Murray*, 149 N. Y. 367.)

The courts have uniformly held that the exceptions in respect to churches and schools should be liberally construed in their favor and strictly against applicants for licenses within the prescribed distance and so as to prevent the mischief aimed at by the limitation. (*People ex rel. Cairns v. Murray, supra*; *People ex rel. Clausen v. Murray*, 5 App. Div. 441; *People ex rel. Gentile v. Excise Board*, 7 Misc. Rep. 415; *Matter of Zinzow*, 18 id. 653; *People ex rel. Sweeney v. Lammerts*, 18 Id. 343; *affd.*, 14 App. Div. 628.)

Again, subdivision 2 of section 31 of the Liquor Tax Law, as it existed when this tax certificate was granted and before the amendment of 1897, defined a hotel as follows: "The term hotel as used in this act shall mean a building or place which is regularly kept open for the feeding and lodging of guests, and in which there shall be at least ten furnished bedrooms for their occupancy if situate in any city, incorporated village, or within two miles of the corporate limits of either; and at least six bedrooms if situate in any other place."

Frank Matty was sworn and described his hotel. He testified that it had ten bedrooms, two on the second floor and eight on the first floor. The two on the second floor were furnished and had windows, and they seemed to be bedrooms in the ordinary acceptation of the term. The eight bedrooms on the first floor are described as follows: Five are seven feet and three inches long and vary in width from five feet and eight inches to seven feet and two inches; two are sixteen feet and six inches long and twelve feet wide; and one is nine feet and six inches long and seven feet and three inches wide. In five of these bedrooms were single beds and mattresses complete; the other three do not appear to have been furnished. He testified that these eight bedrooms were divided by board partitions one inch thick, papered on both sides, which were only seven feet and one inch in height; that the ceiling above these bedrooms was over nine feet above the floor, and that none of these so-called bedroom partitions extends within two feet of the ceiling. Four of these bedrooms were lighted by windows and four were dark. These rooms were not bedrooms within any fair definition of the word, and only five of the eight bedrooms on the first floor were furnished as such, as required by the section last quoted. This

building, at the time this liquor tax certificate was issued and at the time of the trial of this proceeding, was not a hotel within the statute, and the respondent had no right to receive or retain a tax certificate authorizing him to sell liquor in that building as a hotelkeeper.

Entertaining these views, it becomes unnecessary to consider whether in case a building within two hundred feet of a church, which has been licensed to sell, on prescription or by the small measure, not to be drank on the premises, or to sell under what is known as a saloon keeper's license, can be converted into a hotel and sales of liquors therein authorized to be drank on the premises every day in the week under a hotelkeeper's tax certificate. No intimation is made on this question.

From the views expressed, it follows that when the Liquor Tax Law took effect the sale of liquor was not legally carried on on these premises, and that the county treasurer had no authority to grant a certificate.

The judgment should be reversed and the liquor tax certificate issued to the respondent canceled, with costs in favor of the petitioner to be taxed.

HARDIN, P. J., and GREEN, J., concurred.

ADAMS, J. I am inclined to think that the evidence in this case was sufficient to sustain the conclusion that the transfer by Joseph Dunfee to the defendant Matty, in the month of March, 1893, of the license held by the former was of such a character as to confer upon the transferee the legal right to traffic in liquors at the place where that business was conducted.

Upon the hearing the defendant attempted to show what steps had been taken to obtain such transfer, and thereupon the petitioner's counsel stated in open court that he should not dispute the fact that the transfer was made at the time the defendant said it was. This, I think, was equivalent to stipulating that the transfer was regularly made, and as it is conceded that the defendant's license thus obtained was renewed each year, it would seem to follow that he was actually and lawfully carrying on the business of trafficking in liquors at his saloon on the 23d day of March, 1896, and had he been content to have rested his right to a tax certificate upon this fact, I fail to see why he would not have established that right within the provisions of

section 24 of the Liquor Tax Law (Chap. 112, Laws of 1896, as amended by chap. 312, Laws of 1897).

It seems, however, that the defendant entertained some doubt respecting his right to maintain a saloon, the nearest entrance to which was within less than two hundred feet of St. Paul's Church, and in order to obviate this difficulty and remove the doubt he attempted, before applying for his tax certificate, to convert his saloon into a hotel. Upon the hearing before the learned trial justice evidence was given which was designed to show that he had successfully accomplished this metamorphosis, and it was found that the defendant's place was a legal hotel; that it complied with all the requirements of the law as such, and that the defendant was entitled to conduct his "hotel pursuant to the license obtained by him under chapter 112 of the Laws of 1896."

This finding is, in my opinion, wholly unwarranted by the undisputed facts of the case; upon the contrary, it is impossible for me to read the evidence contained in the record without reaching the conclusion that the defendant's attempt to convert his saloon into a hotel was a mere subterfuge and afterthought, and that if the defendant were permitted by the courts to succeed in this attempt, it would encourage other liquor dealers, similarly situated, to adopt the same course, and consequently lead to innumerable evasions of the law, which would ultimately result in depriving it of all force and efficacy.

I am of the opinion, therefore, that the learned trial justice was in error in reaching the conclusion he did, and if so it follows that the defendant made a false statement in his application for a tax certificate. The order appealed from should consequently be reversed and his certificate canceled.

HARDIN, P. J., and WARD, J., concurred.

Determination reversed and tax certificate canceled, with costs.

Fourth Appellate Department, March, 1898. Reported. 28 App. Div. 30.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Appellant, *v.* THE GRAMERCY CLUB and THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Respondents.

Liquor Tax Law—Venue of an action brought upon a bond given by the holder of a liquor tax certificate—It may be changed for the convenience of witnesses—All the defendants should join in the motion—Statements of an expectation of proving the facts by certain witnesses are insufficient.—The witnesses' occupation and residence by street and number should be stated.

The provisions of the Liquor Tax Law (1896, chap. 112, § 18, as amended by chap. 312 of 1897), providing that the State Commissioner of Excise may "commence and maintain an action in any court of record, in any county of the State, for the recovery of the penalty for the breach of any condition of any bond," do not deprive the Supreme Court of its inherent power to change the place of trial of an action brought by the State Commissioner in pursuance of such authority, where the convenience of witnesses requires such change.

A motion to change the place of the trial of an action for the convenience of witnesses must be made by all the defendants who defend, unless some reason is shown why all do not join.

Where in such a case the moving affidavits merely state that the moving party *expects to prove* certain facts by the witnesses named, but fail to state that the facts *can be proved* by the witnesses, and do not disclose grounds showing that the facts can probably be established by them, the moving papers are insufficient.

The moving and opposing papers used upon such a motion should disclose the occupation and residence by street and number of every person claimed to be a material witness, when such person is a resident of a city.

An action brought upon the bond required to be given by an applicant for a liquor tax certificate is not an action "to recover a penalty or forfeiture imposed by statute," within the meaning of section 983 of the Code of Civil Procedure, but is one upon a contract obligation.

Ward, J., dissented.

APPEAL by the plaintiff, Henry H. Lyman, as State Commissioner of Excise of the State of New York, from an order of the Supreme Court, made at the Monroe Special Term and entered in the office of the clerk of the county of Ontario on the 8th day of October, 1897, granting the defendants' motion to change the place of trial from the county of Ontario to the county of New York, for the convenience of witnesses.

Royal R. Scott and Mead & Stranahan, for the appellant.

Frank H. Platt, for the Fidelity and Deposit Company of Maryland, respondent.

Patrick H. Loftus, for the Gramercy Club, respondent.

GREEN, J. It is alleged in the complaint, in substance, that the defendant, the Gramercy Club, applied to the special deputy excise commissioner, at the city of New York, for a liquor tax certificate, and paid the tax of \$800; that it furnished the bond in the penal sum of \$1,600, required by section 18 of the Liquor Tax Law (Chap. 112, Laws of 1896), executed by the club as principal, and by the Fidelity and Deposit Company of Maryland as surety, and obtained the certificate to do business in New York city.

The plaintiff further alleges in the complaint thirty-two separate violations of the Liquor Tax Law by the club, and concludes that, by reason of such violations, the defendants have become liable for the penalty of such bond, and, therefore, are indebted to the plaintiff in the sum of \$1,600.

The defendants answered, taking issue upon the violations alleged.

The plaintiff resides in the county of Oswego and his attorney in the county of Ontario. The defendant corporations have their principal office and place of business in the city of New York, and all their witnesses, twenty in number, reside there.

Upon motion of the defendant, the Fidelity and Deposit Company of Maryland, an order was granted by the Special Term changing the place of trial from the county of Ontario, the county designated in the summons and complaint, to the county of New York, for the convenience of witnesses.

All the alleged transactions set forth as a cause of action arose in the city and county of New York, where the defendants and their witnesses reside, and it seems to me that there is no just reason for laying the venue in the county of Ontario, 300 miles distant from the city of New York, and thus putting the defendants to the expense of taking their witnesses to the county of Ontario, and the witnesses to the trouble of traveling that distance.

The plaintiff does not question the justice and propriety of the

order, but contends that the power of the Supreme Court to change the place of trial in actions on bonds given pursuant to section 18 of the Liquor Tax Law is taken away by the provisions of that law.

If it can be successfully maintained that the court is divested of its power to change the place of trial, although "the convenience of witnesses and the ends of justice will be promoted by the change" (Code Civ. Proc. § 987, subd. 3), it must follow that the court is also shorn of the power to change the venue, although "there is reason to believe that an impartial trial cannot be had in the proper county." (Subd. 2.)

The power in question is inherent in the very constitution of a court, and its exercise is essential to the due and proper administration of its judicial functions, and is of vital importance to an efficient and abiding control over judicial proceedings. As long ago as 1807 it was declared that "we have an equitable power over venues, and we ought so to exercise it as to promote the convenience of suitors and to save expense to the parties." (*Manning v. Downing*, 2 Johns. 453.)

There is a presumption against an intention on the part of the Legislature to infringe upon the province of the judicial department of the government, and to divest the court of any of its essential powers, or to forbid the exercise of such powers in particular cases, and any construction leading to such a result must be avoided if possible. Such an intention must be expressed in clear and unequivocal terms. There must be express negative words, or the implication must be necessary and irresistible. It is supposed that the Legislature would not make so important an innovation without a very explicit expression of its intention. (End. Interp. Stat. §§ 151, 153, 522.)

Section 18 of the Liquor Tax Law (Chap. 112, Laws of 1896, as amended by chap. 312, Laws of 1897) provides that the State Commissioner of Excise may "commence and maintain an action in any court of record, in any county of the State, for the recovery of the penalty for the breach of any condition of any bond, or for any penalty or penalties incurred or imposed for a violation of the Liquor Tax Law." But it is not declared that the trial must take place in the county designated by the commissioner and nowhere else, or that the place of trial shall not be changed pursuant to any provision of the Code of Civil Procedure. There is no inconsistency between this provision and section 987

of the Code, and the Supreme Court is not restrained in the exercise of its powers in the matter of removal. The authority conferred upon the commissioner cannot operate, by construction, to divest the court of its inherent power.

The case of *The People v. Coughtry* (58 Hun, 245; affd., 125 N. Y. 723), upon the opinion of LEARNED, J., and reported in 33 New York State Reporter, 205, is an authority against plaintiff's contention.

Since the Legislature has not attempted to deprive the Supreme Court of one of its necessary judicial functions, the constitutionality of such a legislative act is not involved in this appeal.

We, therefore, do not doubt the power of the court to change the place of trial to the city and county of New York, or to an adjoining county (Liquor Tax Law, §§ 18, 42.) By the latter section, which, however, relates to actions to recover penalties brought against persons trafficking in liquor contrary to the provisions of the act, the power of the court to change the place of trial to the county wherein the defendant resides, or to an adjoining county, is expressly given, and we do not think the Legislature intended to establish a different rule in respect to actions brought under section 18 to recover the penalty of the bond. We see no reason for believing that the Legislature intended to impose greater hardships on the sureties on bonds than on the principal charged with willful violations of the act.

However, there are inherent and fatal defects in the papers on which the motion was made which do not fall within the class of what is known as preliminary objections.

The defendants answered separately by different attorneys. The defenses of both defendants are substantially the same, consisting in a denial of the violation of the condition of the bond. The Fidelity and Deposit Company of Maryland moved to change the place of trial from the county of Ontario to the county of New York, or to the county of Kings, for the convenience of witnesses. The Gramercy Club did not join in the motion. In the order granting the motion it is recited that, on the motion of the attorneys for the Fidelity and Deposit Company of Maryland, the place of trial is changed. No reason is given why both defendants did not join in the motion, nor does it appear that notice of the motion was served on the attorneys for the Gramercy Club. The rule is that a motion to change the place of a trial of an action for the convenience of witnesses must be made

by all the defendants who defend, unless some reason is shown why all did not join. (*Sailly v. Hutton*, 6 Wend. 508; *Legg v. Dorsheim*, 19 id. 700; *Brittan v. Peabody*, 4 Hill, 62, n.; *Welling v. Sweet*, 1 How. Pr. 156.)

In the affidavits stating the names of the witnesses who will be inconvenienced by a change of the place of trial, it is simply stated that the moving defendant expects to prove certain facts by the witnesses named, but it is nowhere stated that those facts can be proved by those witnesses, nor do the affidavits disclose grounds showing that the facts can probably be established by the persons designated, and it is insufficient. (*Thurfjell v. Witherbee*, 70 Hun. 401; *McPhail v. Ridout*, 83 id. 446; *White v. Hall*, 8 App. Div. 618; S. C., 40 N. Y. Supp. 945. See *Hayes v. Garson*, 25 App. Div. 115.)

Some twenty persons are named in the moving papers as necessary and material witnesses for the moving defendant, and the only means of identification given are their names and the statement that they reside in the city of New York. Neither their occupation nor the street nor number of the street is given; this we think is insufficient. The moving and opposing papers used upon such an application should disclose the occupation and the residence by street and number of every person so designated as a material witness when such person is a resident of a city. Otherwise, the opposing party might be unable to ascertain whether such persons were in existence, or to otherwise verify the allegations respecting the necessity of calling them as witnesses at the trial.

It is stated in the complaint that the bond on which the action is brought is annexed to and forms a part of the complaint, and in the answer of the Fidelity and Deposit Company of Maryland the bond on which the action is brought is referred to as being annexed to the complaint, but the bond is not printed in the record, which is defective. Whether the bond contains any provision in respect to the venue or place of trial of an action to be brought thereon does not appear.

As the question of the character of this action was raised and argued upon this motion, I deem it proper to say in conclusion that this is not an action "to recover a penalty or forfeiture imposed by statute." (Code, § 983.) The action is upon a contract obligation to recover the penalty imposed or assumed

by the instrument, and not to recover a penalty imposed by statute, within the intent and meaning of the provision quoted.

The order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs, without prejudice to the right of the defendants to make a new motion.

All concurred, except WARD, J., dissenting.

WARD, J. (dissenting): The record discloses that the only question raised and considered at the Special Term was whether the court had power to change the place of trial in this action from the county of Ontario to the county of New York, the claim of the plaintiff there and appellant here being that the Supreme Court had no power to make the change, as the "Raines Law" had provided that the State Commissioner of Excise could commence an action in any court of record in any county of the State for the recovery of the penalty for the breach of the condition of any bond given under the provisions of this law, and that is the only question presented to us upon this appeal. The objection was not taken, either in the court below or here, that the defendant "The Gramercy Club" had not joined in the motion to change the place of trial, or that the affidavits upon which the motion was granted were defective in any respects as to the materiality or residence of witnesses, or any other irregularity claimed.

I concur in the opinion of the majority of the court as to the power of the court to change the place of trial, but I do not concur in the result reached that the order should be reversed because of the irregularities pointed out in the opinion.

The objection that the Gramercy Club had not formally joined in the motion is wholly without merit; the motion was made upon the pleadings which consisted of the complaint and the answers of both of the defendants and affidavits made in behalf of both of the defendants, the secretary of the Gramercy Club making the principal affidavit as to the witnesses, and the counsel for the Gramercy Club appeared upon this appeal with a brief urging in behalf of that defendant that the order be affirmed so that the technical objection here considered, had it been made at the Special Term or here, could have been cured by the appearance of the "Gramercy Club" upon this appeal.

Nor can I see any need of reversing this order because of the criticism made in the opinion of a majority of the court as to the affidavit in regard to the witnesses. It is true that the affidavits do not state that the facts expected to be proved could be proved by the witnesses, but it is conceded in the opinion, and it appears from the pleadings, that the witnesses do not reside in the county of Ontario, but necessarily reside, and their residences are fixed in the affidavits, in the city of New York, and in view of these concessions, and in view of the fact that the objection here raised was not taken either at the Special Term nor upon this appeal, I do not think we should be astute to discover objections of this character when we can see from the whole case and the papers that the change should be made for the convenience of witnesses.

I think the order should be affirmed, with costs.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, without prejudice to the right to renew upon fresh papers.

Fourth Appellate Department, March, 1898. Reported. 28 App. Div. 623.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Respondent, *v.* GEORGE C. COREY, Appellant.

Order affirmed with ten dollars costs and disbursements, without prejudice to a new motion to change the place of trial to any county. Held, that the moving affidavits are defective in that they fail to state the residence and address of the witnesses; also fail to state that the witnesses will testify to the facts alleged to be material to the defense. (See *Tuska v. Wood*, 81 Hun, 79; *Hayes v. Garson*, 25 App. Div. 116; also *Lyman as Commissioner v. Gramercy Club*, 28 id. 30.)

All concur, except WARD, J., not voting.

Supreme Court, Kings Special Term, March, 1898. Reported 24 Misc. 94.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* EDMUND WOLF, Defendant.

Violations of the Liquor Tax Law in the Greater New York—Jury trial—Misdemeanor.

A person, charged with the misdemeanor of violating the Liquor Tax Law (Laws of 1896, chap. 112), in the borough of Brooklyn, is not entitled to a trial by jury, but may legally be tried at a Court of Special Sessions held by three magistrates.

The defendant, a saloon-keeper, was arrested and brought before a police magistrate in the borough of Brooklyn, charged with a misdemeanor in illegal sales of liquor in violation of the Liquor Tax Law. Laws 1896, chap. 112, § 31. The magistrate held the defendant for trial at the Second Division of the Court of Special Sessions, in the city of New York. The defendant now applies to a justice of the Supreme Court to order the cause removed to the grand jury of Kings county, there to be prosecuted by indictment, basing his application upon the ground that, under section 2 of article I of the Constitution, he was entitled to be tried by a jury as a matter of right. It was urged, in opposition to the application, that by the amendment to the Constitution, adopted in 1870 (section 26 of article VI, now section 23 of article VI), Courts of Special Sessions were given such jurisdiction in the cases of misdemeanors as the legislature might provide; that the people adopted this amendment to overcome the effect of the decisions of the Court of Appeals (*Wynehamer v. People*, 13 N. Y. 378; *Hill v. People*, 20 id. 303), which held that misdemeanors were triable by jury, as matter of right; and that the legislature, in the new charter, having given exclusive jurisdiction, without jury trials, to these courts to hear and determine charges of misdemeanor committed in said city, the act was within the legislative power under article VI, section 23 of the Constitution, as interpreted in the cases of *People ex rel. Comaford v. Dutcher*, 83 N. Y. 240; *People ex rel Stetzer v. Rawson*, 61 Barb. 619; *Devine v. People*, 20 Hun, 98.

Alfred C. Cowen, for motion.

Isaac M. Kapper, assistant district attorney, opposed.

DICKEY, J. Since the Constitution was amended in 1870, providing that Courts of Special Sessions shall have jurisdiction of the offenses of the grade of misdemeanor, as may be provided by law, it has been held in *People ex rel Comaford v. Dutcher*, 83 N. Y. 240, that when the Constitution conferred authority upon Courts of Special Sessions to try misdemeanors, it meant the courts in question as they were and might be constituted by the legislature, whether they authorized a jury of six or otherwise. In this case the legislature has provided otherwise by Special Sessions of three magistrates. It was also held in *People ex rel. Murray v. Justices*, 74 N. Y. 406, that the constitutional provision, giving a party a right of trial by jury, does not apply to petty offenses triable before a Court of Special Sessions. I think all this class of cases, violations of the excise laws, should be speedily tried before the Special Sessions, and should not be removed. The grand jury has plenty of work now, and should not be further burdened.

Motion for certificate of removal denied.

Supreme Court, New York Special Term, February, 1898. Reported
50 N. Y. Supp. 909.

PEOPLE ex rel. BELDEN CLUB v. GEORGE HILLIARD, as Special
Deputy Commissioner of Excise.

COHEN, J. Under what is known as the Liquor Tax Law of 1896, as amended by chapter 312 of the Laws of 1897, the relator asks for a peremptory writ of mandamus requiring the Special Deputy Commissioner of Excise to issue a liquor tax certificate. It is conceded by the respondent that the forms of law have been complied with, and that the certificate does not show on its face that the applicant is prohibited from trafficking in liquor at the place where the traffic is to be carried on. The allegations which the commissioner presents do not give him any discretion under the statutes and he must grant the certificate. Should the suspicions which the opposing affidavits foreshadow prove well founded, speedy and effective methods are provided by the law for the cancellation of the certificate.

First Appellate Department, April, 1898. Reported. 28 App. Div. 127.

In the Matter of the Application of HENRY H. LYMAN for an Order Revoking and Canceling Liquor Tax Certificate No. 1989, Granted to THE YOUNG MEN'S COSMOPOLITAN CLUB of New York.

HENRY H. LYMAN, Appellant; THE YOUNG MEN'S COSMOPOLITAN CLUB of New York, Respondent.

Liquor Tax Law—The burden of proof rests upon the licensee of bringing himself within the exception as to sales of liquor on Sundays and after one o'clock A. M.—An incorporated club may lose its rights by changing its manner of business—Right of the court to examine the whole case in determining the question.

Upon an application by the State Commissioner of Excise to revoke a liquor tax certificate upon the ground that the licensee sold liquor on Sundays and between one o'clock and five o'clock in the morning on week days in violation of section 31 of the Liquor Tax Law (Chap. 112 of 1896, as amended by chap. 312 of 1897), the burden rests upon the licensee of proving that it is a corporation or association organized in good faith under any law which, prior to May 6, 1895, provided for the organization of societies or clubs for social, recreative or similar purposes, and that such corporation or association was actually lawfully organized and, if a corporation, that its certificate of incorporation was duly filed prior to March 23, 1896, and that it at such date trafficked in or distributed liquors among the members thereof, and is thus excepted by section 31 from the clauses of that section forbidding such sales.

A corporation which, having been duly organized in good faith originally for social, recreative and similar purposes, acquired a right under the statute to sell liquor to its members on Sundays, or at any hour on any other day, forfeits such right where it so changes the purpose of its organization or its manner of conducting its affairs that it becomes a mere establishment for the sale of liquors to any person who may choose to buy them.

The court, in determining whether this right exists in the corporation, is not concluded by the fact of the club's organization, but may examine into the whole case for the purpose of determining the question.

APPEAL by the petitioner, Henry H. Lyman, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of December, 1897, denying the petitioner's application for the revocation and cancellation of the liquor tax certificate granted to the Young Men's Cosmopolitan Club of New York.

Royal R. Scott, for the appellant.

William H. Klenke, for the respondent.

RUMSEY, J. On the 26th of April, 1897, there was presented to the Special Deputy Commissioner of Excise for the county of New York an application of the Young Men's Cosmopolitan Club of New York, by Charles Smith, its president, for a liquor tax certificate under the provisions of the Liquor Tax Law (Chap. 112, Laws of 1896). Upon that application, which was in proper form, a liquor tax certificate was granted. On the 4th of June, 1897, a petition was presented to this court by Mr. Lyman, the State Commissioner of Excise, asking for an order revoking and canceling the certificate which had been granted to this club. The application was made pursuant to the provisions of section 28 of the Liquor Tax Law as it was amended by chapter 312 of the Laws of 1897. An order to show cause was granted, and, upon the return of that order, the court made an order of reference to take proof of the facts and report the evidence to the court. Upon the coming in of the referee's report a further hearing was had, which resulted in an order denying the petition, and from that order this appeal is taken. The grounds upon which the application to revoke the certificate was made were that the respondent was violating the Liquor Tax Law by selling intoxicating liquors on Sunday and on week days between one o'clock and five o'clock in the morning, which is forbidden by section 31 of the act. (Chap. 312 of the Laws of 1897.) That the sales were made at such times was not denied; but the respondent claimed that it was within one of the exceptions of the statute, and that for that reason it was authorized to make such sales. As they were undoubtedly illegal unless the respondent brought itself within an exception of the statute, the burden of so doing was upon it. (Black Intox. Liq. § 511.) By way of supporting that burden, the respondent asserted and attempted to prove that it was a club which had been organized in good faith before May 6, 1895, and whose certificate of organization was filed before March 23, 1896; and for that reason it claimed that it was within the exception (§ 31 of the statute), by which it is provided that a corporation or association organized in good faith under any law which, before May 6, 1895, provided for the organization of societies or clubs for social, recreative or similar purposes and which corporation or association

was actually lawfully organized, and, if a corporation, its certificate of incorporation duly filed before March 23, 1896, and which at such date trafficked in or distributed liquors among the members thereof, is excepted from the provisions of those clauses of the section which forbids sales by the holder of the certificate on Sunday or between one o'clock or five o'clock in the morning of any other day. It was assumed by the court below that the evidence established that this club was actually organized in good faith under some law providing for the organization of clubs for social, recreative or similar purposes before May 6, 1895. The evidence upon that subject was simply that an association, calling itself the Young Men's Cosmopolitan Club of the eighth Assembly district of New York, had been formed several years before; that it was unincorporated; had no written by-laws, but that it had some sort of a practice by which members were admitted—that practice being that one desiring admission made an application to a committee of three, who considered the application for five or ten minutes and if they reported favorably, admitted the applicant, and if not, rejected him. It appeared that no action of the club was ever taken upon the application of any person for membership. The testimony was that the objects of the club were partly political and partly social, but the witness, although being somewhat doubtful upon all those points, was perfectly clear that from the beginning of the organization of the unincorporated association it had as a part of its business sold liquor to its members. Upon that point there was no doubt in his mind, or hesitation in his answers. It appeared further that this association was unincorporated until the 15th of June, 1895, at which time articles of incorporation were filed and the club was removed to its present location. Without deciding that these facts established that this corporation was a club duly organized for social, recreative or similar purposes, we shall assume that that is the case (as was assumed in the court below), and shall consider here only the question on which this case must ultimately turn, viz., whether a corporation organized in good faith originally for social, recreative or similar purposes, and which by virtue of that organization has acquired a right under the statute to sell intoxicating liquors to its members on Sundays or at any hour of any other day, is liable to lose that right by a change in the purposes of the organization or in the manner of conducting its affairs.

For a long time there had been not only in this State, but in almost every State of the Union, a serious question whether clubs were amenable to the laws which prohibited the sale of liquor without a license. The final conclusion in this State as established by the Court of Appeals in the case of *The People v. The Adelphi Club* (149 N. Y. 5) was that such clubs organized and carried on in good faith for social, recreative or similar legitimate purposes, to which the furnishing of liquors to its members is merely incidental, and having a limited and selected membership, were not within the statute, and were not required to take out a license for the sale of intoxicating liquors. The question had previously been mooted in the case of *The People v. Andrews* (50 Hun, 592), in which it was held by the General Term of the fifth department that if a club was fraudulently organized for the purpose of evading the excise laws, it would constitute no defense, but the question of fraud was one for the jury. The judgment in that case, however, was reversed by the Court of Appeals. (*People v. Andrews*, 115 N. Y. 427). The steward of an alleged club had been indicted for selling liquors to persons who were not members of the club. The position taken by the defendant in the Court of Sessions, where the indictment was tried and the conviction had, was that the club was a *bona fide* club, duly organized for social purposes, and, therefore, not within the act, and not required to take out a license. This contention of the defendant was overruled by that court, which held that the organization was within the act, and the sale of liquors by the steward was a violation of the statute. The General Term, upon appeal, reversed this conviction, holding that the question whether the club was organized under the act or whether it was organized for the purpose of evading the act, was a question for the jury, and should have been submitted to it. Upon appeal to the Court of Appeals, it was held that the transaction which was charged as a violation of the Excise Law was a violation of the law, and the judgment of the Court of Sessions was affirmed; but this ruling was not put upon the ground that the sale of liquors by a social club to a member, or to persons not members, upon the request of a member, was a violation of the Excise Law, but upon the ground that, as a matter of law, the scheme was a fraudulent one to avoid the provisions of the Liquor Law, and for that reason the sales were illegal. (*People v. Adelphi Club*, 149 N. Y. 10, 11.) This is, therefore, an authority for the prop-

osition that whatever may be the alleged purpose of an organization the court is at liberty to examine into all the facts, and conclude from those facts whether the particular organization is or is not within the provisions of the Excise Law.

The object of the statute is to control the sale of intoxicating liquors in the interest of good order. To that end it has been thought necessary, in accordance with the judgment of the great body of the community, that miscellaneous sales to everybody of intoxicating liquors should not be permitted on Sunday, and that there should be certain hours of other days during which no sales should be made. But the law, under certain circumstances, has permitted certain people to distribute liquors during the otherwise prohibited hours. The object of this exception to the statute is quite clear. There are in every city, and in many of the larger villages of the State, organizations for social purposes, composed of members chosen according to some rule, who have a house or rooms to which they resort, and in which no persons are permitted, except members or guests of members, who are invited according to fixed rules, and who, to a certain extent, use these places as their homes, where they go to meet their friends, to pass their time, and in many instances, where they board and sometimes sleep. So far as these organizations are formed for social purposes or for recreation, or for other purposes for which men are accustomed to come together, and so far as the furnishing of drink is incidental to their organization, to the same extent as the furnishing of meals or newspapers or such other conveniences as a man is accustomed to have in his home, the statute permits it to be done at all times. If it appears that a club is lawfully organized under the provisions of section 31, which has been referred to above, and that liquors are furnished under those limitations to persons who are members of the organization, or to the invited guests of members under such limitations as the organization has prescribed, it is undoubtedly entitled to insist upon its right to be within the exception in the statute. But the Legislature in creating the exception had in view the particular object for which these societies were organized. They must have been, as the statute expressly provides, organized for social, recreative or similar purposes, as to which the supplying of meals and liquors was incidental merely. The statute was not intended to apply to an organization, the sole object of which was to supply liquors to its members for the purpose of evading

the provisions of the Liquor Tax Law. So much must be acknowledged by everybody. The question here, however, is not whether this club, so-called, was originally within the exceptions of the Liquor Tax Law; but, conceding that it was within them in the beginning, has it so conducted its business that there is no difference between its acts and those of a common seller of intoxicating liquors who keeps a bar where liquor is sold to any person who comes with money enough to pay for it, and, if it has so conducted its business, does it thereby lose its right to insist upon the exception which it acquired by the fact of its organization?

The manner of conducting the business of this club is not in dispute. Although it appears that it was organized some years before, there is no very definite statement as to its manner of carrying on business until its articles of incorporation were filed in June, 1895. Soon after they were filed the place of business was transferred from 64 Essex street, where it had been in the habit of meeting, to 518 Sixth avenue, where its rooms now are. The present rooms are over the liquor saloon of Charles Smith, a liquor seller. Charles Smith is the president of this club and it was he who, in April, 1897, applied for the liquor tax certificate. The treasurer and general manager of the club is the person in charge of the liquor saloon below its rooms. The money received for the liquors which are sold in the club are in charge of the general manager, who gives it to the treasurer when the treasurer asks for it. The liquors of the club, so far as it has any, seem to be kept in connection with the liquors of the saloon, and they are furnished by the persons who supply the customers in the saloon. It appears, and is not disputed, that a membership in the club is acquired, when it is acquired at all, by the purchase of a ticket from a person whose post is in the saloon near the entrance to the stairway which leads up to the rooms of the club. This ticket is sold for twenty-five cents to anybody who asks for it, and it seems fairly to be inferred from the evidence that no questions are asked of the persons who apply for a ticket, but they are sold to any one who desires to buy them, and there is no investigation, discrimination or selection as to the membership. It appeared, too, without dispute, that membership tickets were not necessary to obtain an entry into the club, or the right to buy liquors there. Several witnesses testified without contradiction that they went into the club without any

questions being asked of them, passing by the man at the door; that they were not members and had never been there before, but they went to the club and sat down at the tables placed there for that purpose and were served with liquor in the same way as any person might have been in any other saloon. Not only were men served there, but women also; and it appears without dispute that during late hours of the night and down into very early hours of the morning the place was occupied by men and women sitting at the tables and drinking together as in any other place of a similar nature where liquors are sold freely to all persons. The place was fitted up for the sale of liquors like any other saloon. There were no indicia that it was used for any other purpose than the sale of liquors, and although the certificate of incorporation was put in evidence there was no claim that the organization had any other purpose than the sale of liquors. The case is a bald one. It presents clearly and fully the question indicated before whether a place of this kind is brought within the exception of the Liquor Tax Law simply because the certificate is issued to a body incorporated in good faith under the law for the organization of social clubs. Upon the facts shown it is quite clear that the only object for which this place is maintained is the sale of liquors to any persons who choose to come there and buy them, and it has no other reason for existing. It is clearly a device to evade the law. If a club is organized for social or recreative purposes, having a membership which is chosen in accordance with some rule, or after some investigation with regard to the applicant, and some means are taken to ascertain whether his membership is agreeable to the other members of the club, and it appears that the selling of liquors is merely incidental to the other objects for which the club is organized, it may well be held to be within the exceptions of the statute, although liquors are sold, not only to its members, but to other persons who, according to some rule of the club, are introduced within its precincts as invited guests. Where it appears that the club has no other reason for its existence than the sale of liquors to any person who chooses to become a member by paying a small sum; that there is no selection of its members, but that any person is eligible; that persons who are not members are permitted to buy liquors in the club; that women are also permitted, with or without membership tickets, to purchase liquors and drink them there, so that it is quite clear that the whole scheme is

one to evade the statute, the fact that a lawfully organized corporation carries on the business does not prevent it from being a common rum-selling establishment, nor secure to it the benefit of the exception. (Black Intox. Liq. § 142.) In the book just cited, the authorities upon the subject are collated, and the rule just above laid down is to be clearly evolved from them. (11 Am. & Eng. Ency. of Law, 727.) Where it appears plainly that the corporation exists solely for the purpose of carrying on an establishment for selling intoxicating liquors to any one who chooses to buy them, the court is not bound to stop with the fact of its organization, but may examine into the whole case, and if it concludes that it is organized for the purpose of evading the statute, it is at liberty to say so and revoke the certificate, as it might revoke the certificate of any other person who sold liquors illegally. For these reasons we think that the court below erred in denying the motion to revoke the certificate, and its order should be reversed, with ten dollars costs and disbursements, and the motion to revoke the certificate granted, with twenty-five dollars costs and the disbursements of the proceedings.

VAN BRUNT, P. J., PATTERSON and McLAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with twenty-five dollars costs and disbursements

First Appellate Department, April, 1898. Reported 28 App. Div. 140.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. BELDEN CLUB,
Respondent, v. GEORGE HILLIARD, as Special Deputy Commissioner of Excise for the County of New York, Appellant.

The issue of a liquor tax certificate depends entirely on the application—

The officer issuing it has no discretionary power.

By section 19 of the Liquor Tax Law, as amended in 1897 (1896, chap. 112, as amended by chap. 312 of 1897), the right of an applicant to a liquor tax certificate is made to depend altogether upon the statements contained in his application therefor; that section leaves no discretionary power with the officer empowered to issue the certificate.

APPEAL by the defendant, George Hilliard, as special deputy commissioner of excise for the county of New York, from an order

of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of February, 1898, granting the relator's motion for a peremptory writ of mandamus requiring the defendant to forthwith approve of the bond filed by the relator with the defendant, and to issue a liquor tax certificate to the said Belden Club, and, also, from the writ of mandamus issued thereon.

Alfred R. Page, for the appellant.

Patrick H. Loftus, for the respondent.

PATTERSON, J. The relator (respondent) is a club duly organized under the act of 1875, whose certificate of incorporation was approved by a justice of the Supreme Court in the year 1886. By its president, acting as stated under a resolution of the club, it applied to the special deputy commissioner of excise of the county of New York, to obtain a liquor tax certificate under the provisions of chapter 112 of the Laws of 1896, as amended by chapter 312 of the Laws of 1897. The statement upon which the application was based was sufficient in form and also in substance to entitle the applicant *prima facie* to the certificate asked for. The special deputy commissioner of excise rejected the application and refused to issue a certificate, whereupon the relator applied to the Supreme Court for a mandamus. In answer to that application, the special deputy commissioner of excise set up by affidavit, in substance, that the premises mentioned in the relator's statement and application for a certificate were, and for some time had been, kept by another organization called the Gramercy Club, that they were in the sole management and charge of one Corey, who, under the cloak and cover of a club or organization, used said premises as a resort for lewd persons and disorderly characters; that a liquor tax certificate issued to the Gramercy Club was revoked by the Supreme Court; that said Corey is still in charge of the same premises; that he is using the charter of the Belden Club, this relator, for the same purpose for which he used the Gramercy Club charter; that the chief of police has protested against the granting of a liquor certificate to this relator, and that he verily believed that it is the intention to carry on the same unlawful and disreputable business under a license to be procured by the Belden Club in substitution for the revoked license of the

Gramercy Club. The justice at Special Term granted a peremptory mandamus to the relator, and from the order entered thereon this appeal is taken.

It is claimed by the appellant that, under subdivision 9 of section 23 of the Liquor Tax Law, he had the power and discretion to refuse the relator's application for a certificate. If the terms of the act as it was originally passed in 1896 had not been changed prior to the time of the relator's application for a liquor certificate, there would have been no difficulty in sustaining the contention of the appellant. (*People ex rel. Anderson v. Hoag*, 11 App. Div. 74.) Section 23 of the statute referred to relates to persons who shall not traffic in liquors, and to whom liquor certificates shall not be granted. Subdivision 8 of section 23 of the original act, now subdivision 9 of the amended act, provides as follows: "No corporation, association, copartnership or person, who as owner or agent carries on or permits to be carried on, or is interested in any traffic, business or occupation, the carrying on of which is a violation of law, shall traffic in liquors or be granted a liquor tax certificate or be interested therein." That provision, standing alone, would confer upon the special deputy commissioner a clear right to determine, in the first instance, whether an applicant for a liquor tax certificate came within the prohibition of the law, and the facts set forth in the affidavit above referred to would have justified a refusal of the certificate; but section 19 of the Liquor Tax Law, which must also be given effect to, in terms deprives the special deputy commissioner, or any other person having the authority to issue such certificate, of any right of judgment or discretion in the matter. As section 19 originally read (the act of 1896) it was enacted that "when the provisions of sections seventeen and eighteen of this act (relating to statements to be made upon an application for liquor tax certificates and bonds to be given by applicants) have been complied with, and the application provided for in section seventeen is found to be correct in form, and the bond required by section eighteen is found to be correct as to its form, and the sureties thereon are approved as sufficient by the county treasurer, or if in a county containing a city of the first class by the special deputy commissioner for such county, then, upon the payment of the taxes levied under section eleven of this act, the county treasurer of the county, and in a county containing a city of the first class, the special deputy commis-

sioner for such county * * * shall at once prepare and issue to the corporation, association, copartnership or person making such application and filing such bond and paying such tax, a liquor tax certificate in the form provided for in this act." By the amendment of 1897 section 19 is made to read: "When the provisions of sections seventeen and eighteen of this act have been complied with, and the application provided for in section seventeen is found to be correct in form, *and does not show on the face thereof that the applicant is prohibited from trafficking in liquor,*" etc. Thus, by the express terms of the act, the right of the applicant to the liquor tax certificate is made to depend altogether upon the statement contained in the application, thus taking away any discretion that might have resided in the officers empowered to issue the certificate. This amendment is so conspicuous and radical that it must have been inserted for some real or supposed cogent reason, and it doubtless was to prevent any other influence operating upon those authorized to grant certificates than the statements of the applicant, made under the responsibilities and subject to the penalties imposed by the statute for making false representations in the statement upon which the application for a certificate was based, or for carrying on unlawful business under the cover of an issued certificate. The penalties imposed by the statute are rigorous and may be readily enforced and if, as the special deputy commissioner in this case seems to have reason to believe, the design of the parties applying for this certificate is still to carry on, or permit to be carried on, a prohibited business, it will be the duty of the authorities at once to invoke the power of the court to cancel the certificate and punish the offender. That course was pursued in the case of *The Gramercy Club*, and the action of the Special Term of the Supreme Court in revoking a liquor tax certificate of that club has been sustained by this court in a decision made at this term. (See *post*, p. 209). Under the provisions of the Liquor Tax Law and its express command contained in the amendment of the 19th section above cited, the court below was right in directing a mandamus to issue.

The order appealed from must be affirmed, with costs.

VAN BRUNT, P. J., BARRETT, RUMSEY and McLAUGHLIN, JJ., concurred.

Order affirmed, with costs.

First Appellate Department, April, 1898. Reported. 28 App. Div. 209.

In the Matter of the Application of HENRY H. LYMAN, for an Order Revoking and Cancelling Liquor Tax Certificate No. 4079, Granted to THE GRAMERCY CLUB.

THE GRAMERCY CLUB, Appellant; HENRY H. LYMAN, Respondent.

Liquor Tax Law—Revocation of the certificate of a club, organized to evade the statute, and in which membership is dependent solely on a nominal payment.

The Supreme Court has power to revoke and cancel a liquor tax certificate issued to a club which was not organized in good faith, but merely for the purpose of violating or evading the statute; it being without by-laws, no meeting having been held after that at which it was organized, its members having no interest in its property nor voice in its management, and any person being able, upon payment of a membership fee of from ten to twenty-five cents, to obtain liquor there.

APPEAL by The Gramercy Club, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of January, 1898, revoking and canceling the liquor tax certificate issued to The Gramercy Club.

Patrick H. Loftus, for the appellant.

Royal R. Scott, for the respondent.

MCLAUGHLIN, J. This is an appeal from an order revoking and cancelling a liquor tax certificate granted to the Gramercy Club, upon the ground that it had forfeited its right thereto by trafficking in liquors on Sundays and between the hours of one and five o'clock in the morning; also upon the ground that it was not organized in good faith and its membership was not a legitimate membership, and that it had permitted its premises to be used as, and the same was, a disorderly house.

The most casual consideration of the record before us cannot fail to convince one that the order was right and should be affirmed. This record shows that the Gramercy Club was not organized, or the business thereafter conducted by it, in good

faith so as to bring it within the provisions of the statute (Laws of 1896, chap. 112, § 31, as amended by Laws of 1897, chap. 312) relating to clubs. It was organized for the purpose of violating the law. The charter was purchased by one Edward B. Corey, and then he and two or three of his employees met in the barroom, and they said "we are the Gramercy Club." This was the origin of the club, this constituted the organization, and this was the only meeting held. Thereafter Corey had some tickets prepared which were given to the women who frequented the place with instructions to write in the names of such persons as they saw fit. Any person could become a member by the payment of from ten to twenty-five cents. Corey was the owner of the place; he received all the money that was taken in; he was the Gramercy Club. No by-laws were ever adopted and no meeting was ever held after the organization. The place was frequented by a large number of women for immoral purposes, to whom liquor was served on Sundays and during prohibited hours. Its alleged members had no interest whatever in the property; they had no voice in the management of the club. Any person could obtain liquor after one o'clock, a. m., or on Sundays, by joining the club, and nothing was done in the place except to drink, smoke and solicit for prostitution. It was not a club. It was nothing more or less than a fraudulent scheme or device concocted by Corey to evade the law. Under such a state of facts, which are uncontradicted, it cannot be seriously contended that such a place is a club within the intent and meaning of the statute above referred to.

The order was right and should be affirmed, with costs.

VAN BRUNT, P. J., RUMSEY and PATTERSON, JJ., concurred.

Order affirmed, with costs.

Supreme Court, Ulster Special Term, April, 1898. Reported. 23 Misc. 446.

Matter of an Application to Revoke and Cancel Liquor Tax Certificate No. 14,111, granted to BERNARD E. McCUSKER.

Liquor Tax Law—A corner building used as a saloon—Measurement of 200 feet from its entrance to that of a synagogue around the corner—When a building is used “exclusively” as a church—Occupation as a saloon, prior to March 23, 1896, shown by stipulation.

Upon an application to revoke a liquor tax certificate, it appeared that the saloon in question was on the corner of Division and Third streets, and that a synagogue adjoined it on Third street. An entrance to the saloon from Third street had never been used by the licensee; he had boarded it up and had extended a portion of his bar beyond the interior opening of this entrance. The center of the main entrance on Division street, although around the corner, was within 200 feet of the center of the nearest entrance of the synagogue, when measured in a straight line. Held, that the building was within the inhibition of the statute (Laws of 1896, chap. 112, § 24, subd. 2, as amended by Laws of 1897, chap. 312). It appeared that the basement of the synagogue was rented by its trustees to five societies connected with the synagogue and largely composed of its members and that the rentals were used to maintain the synagogue. Held, that the synagogue was occupied “exclusively” as a church, within the meaning of the statute.

Where the parties to such a proceeding stipulate that the premises “have been regularly licensed and occupied continuously as a saloon for the sale of liquor for a period of at least ten years,” before April 6, 1898, the premises are clearly within the statutory exemption given to a place in which traffic in liquors was actually carried on, on the 23d day of March, 1896.

Parties by their stipulations may make the law for any legal proceeding in which they are impleaded, which not only binds them, but which the courts are bound to enforce.

APPLICATION for the revocation of a liquor tax certificate.

George E. Sands, for petitioner.

Howard & Peck, for county treasurer of Rensselaer county.

Frederick A. Chew, for Bernard E. McCusker.

CLEARWATER, J. This is an application for the revocation of a liquor tax certificate upon the grounds:

1. That the traffic is conducted in a building on the same street and within two hundred feet of a church.

2. That the defendant made false statements in the application for the transfer of his certificate.

The matter is submitted upon the petition, answer and the testimony taken before a referee.

The defendant originally obtained a liquor tax certificate for the carrying on of his business at Nos. 28 and 30 Division street in the city of Troy, a building owned by his sister, who terminated his lease, and let the property to two other brothers, whereupon the defendant had his certificate transferred to a building upon the southwest corner of Third and Division streets in that city. As originally constructed, the latter building had three entrances on Division, and one on Third street. The entrance on Third street has never been used by the defendant, is nailed up and permanently closed, and a portion of the bar projects beyond the interior opening. On the adjoining lot upon Third street is the Jewish Synagogue of Berith Sholom.

Chapter 112 of the Laws of 1896, prohibited traffic in liquor in any building on the same street and within two hundred feet of a building occupied exclusively as a church, the measurement to be taken from the center of the nearest entrance of the church to the center of nearest entrance of the place in which the traffic was to be carried on (§ 24, sub. 2), and it has been held that a building situate upon a corner of two streets is within the inhibition of the act notwithstanding it fronts on a different street from the church. *People ex rel. Clausen v. Murray*, 5 App. Div. Rep. 441; *Matter of Zinzow*, 18 Misc. Rep. 653.

By chapter 312 of the Laws of 1897, however, the law was amended so as to provide that the measurement shall be taken *in a straight line* from the center of the nearest entrance of the church to the center of the nearest entrance of the place in which the traffic is to be carried on. Sec. 24, sub. 2.

It is claimed by the defendant that this means that the measurement must be made in a line as the street runs, and if thus made, the Division street entrance cannot be reached, as to include it, it is necessary on reaching the corner of Third street, to turn at right angles.

I do not so understand the law. A straight line is one free from angularities or curvatures, and is the shortest and most direct distance between two points. Thus measured all the Division street entrances are within the prohibited distance.

It is also claimed by the defendant that the synagogue is not a

building occupied exclusively as a church within the meaning of the statute.

Five societies: The Independent Order of Benai Berith, The Independent Order of Keshar Shel Barsel, The Free Sons of Israel, The Sisterhood Benevolent Society, and The Young Peoples' Association, meet in the basement and pay the trustees of the synagogue a small rental, which defrays the expense of light, fuel and the service of a janitor. This rent goes into the treasury of the synagogue, and is used for its maintenance. Membership in these societies is confined to persons of the Jewish faith, and their object is the union of Israelites in promoting the interests of the race, elevating the character of the Jewish people, inculcating principles of philanthropy, honor and patriotism, the support of science and art, alleviating the wants of the poor, visiting the sick, aiding the victims of persecution and protecting and assisting the widow and orphan. They are of a sectarian, but not of a religious character. Ninety per cent. of their members are members of the congregation of Berith Sholom and the principal reason for using the basement of the temple as a place of meeting, is to aid its congregation in defraying its expenses.

I do not think that this use of the basement of the synagogue by these benevolent societies is at all inconsistent with its use as a place of worship; nor do I think that its effect is to deprive the synagogue of the protection of the act. The precise shade of meaning to be given to the term "exclusively," has been so recently and fully discussed in the case of the People ex rel. Young Men's Association of Albany *v.* Sayles, 23 Misc. Rep. 1, that it is unnecessary to reiterate here the views there expressed. They are in accord with the authorities to which reference is made in the opinion in that case, and are controlling here.

It is but proper to add, that this proceeding is not prosecuted by any person connected with the synagogue, but by one Richard N. Holden, who admits entertaining a feeling of bitter hostility to the defendant, and whose action it is charged, is inspired in part by this ill-will, and in part by the brothers of the defendant who succeeded him as tenants of his sister's property. While the animus of the complainant is not specially pertinent, it is entirely apparent.

The act of 1897, provided, however, that the prohibition relative to a church, should not apply to a place in which traffic in liquor was actually carried on, on the 23d day of March, 1896.

At the close of all the testimony before the referee, the following stipulation assented to by counsel for all the parties was entered upon the minutes and is reported with them to the court:

“April, 6, 1898.

It is admitted by the counsel for the respective parties, that the premises now occupied by Bernard E. McCusker as a saloon, to wit, Nos. 60 and 62 Division street, or 161 Third street, as the case may be, have been regularly licensed and occupied continuously as a saloon for the sale of liquor for a period of at least ten years, without any interruption or cessation in the business up to the present time and that no other business except a saloon business was carried on there.”

Parties by their stipulations, may in many ways make the law for any legal proceeding in which they are impleaded, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory and even constitutional rights. They may stipulate for shorter limitations of time for bringing actions than are prescribed by statute. They may stipulate that the decision of a court shall be final and thus waive the right of appeal; and all stipulations made by parties for the government of their conduct, the control of their rights or for the guidance of the court in the trial of a cause or the conduct of litigation of any character not unreasonable or against good morals or public policy will be enforced by the courts. *Matter of Petition of New York, Lackawanna & Western Railroad Co.*, 98 N. Y. 447-453; *Buel v. Trustees of Lockport*, 3 id. 197; *Embury v. Conner*, id. 511; *Sherman v. McKeon*, 38 id. 266; *Allen v. Commissioners, etc.*, id. 312; *Vose v. Cockcroft*, 44 id. 415; *Phyfe v. Eimer*, 45 id. 102; *De Grove v. Insurance Co.*, 61 id. 594; *Ogdensburgh & L. C. R. R. Co. v. V. & C. R. R. Co.*, 63 id. 176; *Wilkinson v. Insurance Co.*, 72 id. 499; *Baird v. Mayor*, 74 id. 382; *Hilton v. Fonda*, 86 id. 339; *Steen v. Insurance Co.*, 89 id. 315; *Matter of Cooper*, 93 id. 507; *Stedeker v. Bernard*, id. 589.

Although the statute uses the adverb “lawfully,” and the stipulation “regularly,” it is, so far as this proceeding is concerned, an idle waste of time and words to undertake to distinguish them in meaning. Regularly, in common English means: Constituted, appointed, or conducted in the proper manner; conformable to law or custom; duly authorized. And if as agreed by all the parties to this proceeding, the premises of the

defendant were regularly thus licensed and occupied continuously at least nine years prior to the passage of the act of 1897, they are clearly within the exemption.

This stipulation renders further discussion of the case useless, and the application to revoke the defendant's license is denied, with such costs and disbursements as are properly taxable in a special proceeding.

Ordered accordingly.

Supreme Court, Queens Special Term, April, 1898. Unreported.

PEOPLE v. SEAMAN.

MOTION to remove excise case, violation of subdivision 1 of section 31 of Liquor Tax Law, from Special Sessions in Queens Borough, city of New York, to Grand Jury on ground that sections 35 and 35-a of Liquor Tax Law require prosecution to be by indictment save in the city and county of New York.

Frederick L. Gilbert, for defendant.

George W. Davison, for the People.

MADDOX, J. The defendant has been held for trial in the Court of Special Sessions of the City of New York, in the Borough of Queens, charged with the commission of a misdemeanor, i. e., a violation of subdivision 1 of section 31 of the Liquor Tax Law, "within the city of New York" and he asks for an order of removal to the County Court of Queens county.

By section 1406 of the Greater New York Charter, chapter 378, Laws of 1897, Courts of Special Sessions of the city of New York, have, "in the first instance" exclusive jurisdiction "to hear and determine all charges of misdemeanors committed within the city of New York" except charges of "libel" unless the jurisdiction to proceed with the hearing is divested as by that section provided.

A violation of the Liquor Tax Law is declared to be a misdemeanor, and the Greater New York Charter, enacted subsequent to the Liquor Tax Law, by implication repeals the repugnant and

inconsistent provisions of sections 35 and 35-a of the Liquor Tax Law, in so far as they relate to trials of those charged with the commission of misdemeanor within the present city.

No constitutional right has been infringed and defendant's contention is without merit.

Motion is, therefore, denied.

Supreme Court, Onondaga County, April, 1898. Unreported.

PEOPLE ex rel. HENRY H. LYMAN v. AMERICAN SURETY COMPANY,
Impleaded with THOMAS R. BOONE.

WATSON M. ROGERS, Referee: This action was begun March 8, 1897, and is to recover upon a bond filed with the County Treasurer of Onondaga county, pursuant to section 18 of the Liquor Tax Law — the holder of the liquor tax certificate having suffered his premises to become disorderly, contrary to one of the conditions of the bond. The party plaintiff is designated in the title of the action "The People of the State of New York ex rel. Henry H. Lyman, State Commissioner of Excise."

The answer of the defendant American Surety Company sets up a defect in the party plaintiff, that the bond was made to the People of the State and not to the plaintiff; that it is not brought by the county treasurer, nor by a special deputy commissioner of excise; and that the plaintiff has no capacity to sue.

The defendant's counsel insists that these defenses are all good; but the plaintiff's counsel urges they have been waived by failing to demur, (Code, § 488; *People v. Lamb*, 85 Hun, 171), and, without so admitting, says that if good, they are not available.

Certain persons as infants, idiots, lunatics, &c., cannot sue except by guardians, committees, &c., and this is said to be what is meant by want of capacity to sue (*Bank of Havana v. Magee*, 20 N. Y. 355-359). Assuming there be capacity to sue or a want of it, which has been waived, nevertheless, the cause of action must belong to the party prosecuting (*Davis v. The Mayor*, 14 N. Y. 506, 527; *Mosselman v. Caew. 1 Thompson & Cook*, 171-173); — he must be the "real party in interest" unless acting in a

representative capacity (Code, § 449); and, ordinarily, when an instrument is under seal, no person can sue or be sued to enforce its covenants who is not named as a party to it. (*Henricus v. Englert*, 137 N. Y. 488.)

What interest has the plaintiff in this action, and where is the authority to sue?

The action was begun March 8, 1897. The Liquor Tax Law (Laws of 1896, Chap. 112) was then in its original form. The plaintiff's rights must be determined by the statute as it then was.

Section 18 of the act provides that an applicant for a liquor tax certificate "shall give a bond to the People of the State of New York, in the penal sum of twice the amount of the tax for one year, upon the kind of traffic in liquor to be carried on by such applicant, where carried on, but in no case for less than \$500 conditioned, that if the tax certificate applied for is given, the applicant or applicants will not while the business for which such tax certificate is given shall be carried on * * * permit such premises to become disorderly, and will not violate any of the provisions of the Liquor Tax Law."

This section makes no provision for suit for a breach of the conditions of the bond, nor is any disposition made of the recovery that may be had for such breach.

By section 36, entitled "Collection of Fines and Penalties and Forfeiture of Bonds" it is provided, that upon the conviction and sentence of any party holding a liquor tax certificate for a violation of the provisions of the act, the penalty for which is prescribed in sections twenty-eight, twenty-nine and thirty-four thereof, the court or officer imposing such sentence, or the clerk of the court, if there be a clerk, shall forthwith make and file in the office of the clerk of the county in which such conviction shall have been had, a certified statement of such conviction and sentence, and the clerk of the court shall, immediately thereupon, enter a judgment in his office for the amount of the penalty or fine, and costs, imposed against the party so convicted "*and in favor of the state commissioner of excise.*" Provision is then made for the issue of an execution and payment of the moneys collected upon the execution to the county treasurer or special deputy commissioner. It further provides: "In case such judgment debtor or debtors shall have given the bond provided for in section 18 of this act, such county treasurer or *special deputy*

commissioner, may proceed to collect the amount of such judgment, together with the costs of collection from the sureties on such bond, by due process of law."

So that under the last-mentioned section, the People cannot, nor the state commissioner of excise, notwithstanding the judgment is in his favor, prosecute the bond for collection of the judgment.

If the People, or State Commissioner of Excise can sue the bond for breach of the conditions mentioned in section 18, and the county treasurer or special deputy commissioner for the judgment, under section 36, the same sureties may be subjected to the annoyance of two actions by different parties on the same bond, and at the same time. If one should prosecute to judgment and execution, would payment of the execution be such a satisfaction as to diminish, or wholly defeat the recovery by the other?

At the best, confusion, and perhaps injustice, would follow a construction giving the People or State Commissioner of Excise, or both, power to maintain the action.

So far as I am able to discover, the act itself nowhere, by express terms, gives the People, the State Commissioner of Excise, or the People on the relation of the State Commissioner of Excise, authority to prosecute any action.

That the State Commissioner of Excise cannot enforce the lien given by section 12 has recently been decided. (*Lyman v. McGrievy*, 25 App. Div. 68.)

The People cannot sue without title (*People v. Ingersoll*, 58 N. Y. 1), nor except where enabled to do so by some statute. (*People v. Bellknap*, 58 Hun, 241.)

Penalties are provided for violations of the act, and "wilful" violations for which no penalty or punishment is otherwise prescribed, are made misdemeanors. (Section 42.)

Offenders may be prosecuted and tried as for crimes. (Sections 30, 33, 34, 35.)

It seems to me, then, that there is no authority in the original act, either express or implied, to the people on the relation of the State Commissioner of Excise to maintain an action on the bond, provided in section 18. This, probably, is a defect in the statute, as prior and subsequent legislation, regarding excise, has been explicit on this subject.

The Excise Law of 1857, (Chap. 628, Laws of 1857) required

the applicant to give a bond (§ 7) and named a party to sue for its breach. (§ 24; *People v. Groat*, 22 Hun, 164.)

The amendments to the Liquor Tax Law passed April 20, 1897, (Laws of 1897, chap. 312) leave no uncertainty as to the proper party now to bring suit.

The amendment to section 18 gives authority to the State Commissioner of Excise "to commence and maintain an action in his name, as such commissioner, in any court of record in any county of the State, for the recovery of the penalty for breach of any condition of any bond, or for any penalty or penalties, incurred or imposed, for a violation of the Liquor Tax Law, and all moneys recovered in such actions shall be paid over and accounted for in the same manner as are moneys collected under subdivision 4 of section 11 of this act"; that is, all moneys recovered shall be paid to the State Commissioner of Excise, and by him to the State Treasurer. (Sec. 11, subdivision 4, sec. 13.)

Section thirty-six is also amended by taking away from the county treasurer and special deputy commissioner power to sue, and conferring it upon the State Commissioner of Excise.

Section forty-two is amended by providing for a penalty of \$50 for certain violations, in addition to the punishment and penalties otherwise imposed "to be recovered by the State Commissioner of Excise in an action brought in his name, as such commissioner, in any court of record in any county of the State."

The same section gives to the State Commissioner of Excise authority to bring an action in his name, as such, to recover the penalty provided for by section 38 — being for neglect of duty by any officer charged with the execution of the provisions of the act.

Thus it will be seen the amendments make the State Commissioner the party for the prosecution of all actions given by the statute, except under the 39th section, being for damages done by persons while intoxicated.

While a statute containing obscure or doubtful provisions for its execution cannot be held defective, because the Legislature sees fit subsequently to amend it in those particulars (*Rand v. Mass. Life Ins. Co.*, 18 Misc. 336-8) yet it seems to me that in this case, where the original statute contained no express provision for the prosecution of actions arising under it, the amendment explicitly conferring the power to sue upon the State Commissioner of Excise, it must be assumed the Legislature was

of opinion that the original statute was imperfect, and needed the amendment to give it efficacy. This is a legislative interpretation. The amendment may be considered in interpreting the original act. (*Smith v. The People*, 47 N. Y. 330; *People v. Smith*, 69 N. Y. 174; *The People ex rel. Savings Bank v. Butler*, 147 N. Y. 164.)

It may be suggested, though the plaintiff's counsel does not so claim in his brief, that section 1962 authorizes the bringing of this action. The title of the chapter of which that section is a part is "Actions in Behalf of the People," and an action under the section referred to must be in behalf of the People, and brought by the "attorney-general or the district attorney of the county in which the action is triable." This is not so brought.

It seems to me, therefore, that the plaintiff "The People of the State of New York ex rel. Henry H. Lyman," has no interest in this action, nor authority to sue; and that the complaint should be dismissed.

Supreme Court, New York Special Term. Reported. N. Y. L. J. May 6, 1898.

HENRY H. LYMAN *v.* FIDELITY & DEPOSIT COMPANY AND BROADWAY GARDEN HOTEL AND CAFE COMPANY.

SCOTT, J.: This is an action upon a bond given under the provisions of the Liquor Tax Law, conditioned for the faithful observance of the law by a corporation to whom a liquor tax certificate was issued. The complaint alleges in a single cause of action a great number of violations of the law, and the defendant, among other things, asks that the plaintiff be required to separately state and number these violations as distinct causes of action. The bond, which follows the requirements of the statute, provides that it is "to cover every violation of the Liquor Tax Law, and all fines and penalties incurred or imposed thereunder. An action for the breach of any condition of this bond may be maintained without previous conviction or prosecution for violation of any provision of said Liquor Tax Law." Reading the statute and bond together it appears that every violation, by the person for whom the bond is given, of the provisions of the Liquor Tax Law, constitutes a separate and complete cause of

action for the forfeiture of the bond and the recovery of the amount of penalty specified therein. If this be so, the plaintiff has alleged something like twenty-six different causes of action instead of only one. I think that the defendants' motion, so far as concerns separately stating and numbering the causes of action, must be granted. The defendant makes numerous other requests to strike out portions of the complaint and to make other portions more definite and certain. If the complaint is to be amended by separately stating and numbering the causes of action it is not, perhaps, necessary to pass upon these requests, since the allegations which give rise to them may not be repeated in the amended complaint. It may be useful, however, to consider them at the present time, so as to obviate the necessity for a further appeal to the court for a correction of the amended pleading. The complaint abounds in statements which are mere conclusions of law, and have no place in a pleading under our practice. Such allegations are "in violation of the conditions and covenants of the bond" and "that the suffering and permitting said premises to become, be and remain disorderly was a violation of said Liquor Tax Law and a breach of the conditions and covenants in said bond contained" and "in violation of paragraph 'b' of section 31 of said Liquor Tax Law" and many of similar import. The code required that the complaint shall state the facts upon which relief is sought, and with the facts properly and sufficiently pleaded the court will be able to determine whether they state "unlawful acts" or "violations of the conditions of the bond and of the Liquor Tax Law." Most of the paragraphs of the complaint alleging violations of the law as they stand would require an order for a bill of particulars. Since the complaint must be amended the application therefor need not be now entertained. Indeed, in any view it is premature at the present time, since no answer has been served and it does not appear that a bill of particulars is necessary in order to enable the defendant to answer. The motion that the several causes of action be separately stated and numbered will be granted, but without costs. Settle order on notice.

County Court, Saratoga County, May 1898. Unreported.

PEOPLE V. GEORGE W. SMITH.

HOUGHTON, J.: I think it appears upon the face of the indictment that there is but one crime charged.

The first count alleges that the defendant sold liquor to one Hollis H. Bailey, in quantities less than five wine gallons at a time, to be drunk upon the premises where sold, at the town and village of Saratoga Springs, in the county of Saratoga, on the 19th day of April, 1897, without having paid the liquor tax and obtained and posted up the liquor tax certificate permitting him to sell and dispose of liquors in that manner.

The second count charges the selling to have been done by the same defendant, to the same person, on the same day and at the same place, and in the same manner, and only differs from the first count in alleging that the liquor was in fact drunk upon the premises where the same was sold.

I do not think that this should be construed as charging a second offense, but that on the contrary it may be said to be fairly within the rule which permits the charging of the same crime to have been committed in different ways, by different counts in the same indictment.

I think the indictment charges only one crime, alleging it to have been committed in a different manner by the two counts.

The demurrer is disallowed and overruled, and the defendant is permitted, at his election, to plead to the indictment.

Let an order and judgment be entered accordingly.

Defendant excepts.

Supreme Court, Erie Special Term, May, 1898. Reported. 23 Misc. 477.

THE PEOPLE ex rel. ADELBERT LANGWORTHY, Relator, v. JOSEPH E. HAZARD, Sheriff of Cattaraugus County, Respondent.

Liquor Tax Law—Imprisonment can not be directed as an alternative for the nonpayment of a fine.

A person who has been convicted under the Liquor Tax Law can not be imprisoned as a condition for the nonpayment of a fine imposed upon him by the court, and when confined under a sentence of such a tenor is entitled to be discharged from imprisonment.

PROCEEDINGS by *habeas corpus* to discharge the defendant from the custody of the sheriff of Cattaraugus county.

D. E. Powell (W. G. Laidlaw, of counsel), for Relator.

Joseph H. Congdon, District Attorney, for Respondent.

TITUS, J.: This is a proceeding, by *habeas corpus*, to discharge the defendant from the custody of the sheriff of Cattaraugus county.

On the 14th day of March, last in the County Court of Cattaraugus county, Adelbert Langworthy was convicted of the crime of selling liquor in quantities less than five gallons at a time, without having paid the tax and posted the liquor tax certificate. On the 21st day of March, the court sentenced the defendant to pay a fine of \$200, and to stand committed to the county jail until paid, not to exceed one day for each dollar imposed as a fine.

The only question raised on the return of the writ was, whether the court had the power, under the law, to impose a fine, and imprison the defendant for failure to pay the same, under the provisions of the Penal Code.

It does not seem necessary to enter into a discussion of this question. The same question was before the Appellate Division of the fourth department in *People ex rel. Bedell v. Kinney*, reported in 24 App. Div. at page 309. In that case the writ was dismissed, as having been prematurely taken, but Judge Ward, in the opinion (although the court did not pass upon this question), held that such a sentence was contrary to the provisions of the Liquor Tax Law; that it conferred no power upon the court to impose imprisonment as a penalty for not paying the fine.

In the case of *People v. Stock*, 26 App. Div. 564, recently decided by the Appellate Division in the second department, the court unanimously held, in a case where the facts are parallel in all particulars to the case under consideration, that the provisions of the Criminal Code providing that a judgment which imposes a fine may also direct the criminal to be imprisoned until the fine is paid, for a term not exceeding one day for each dollar of the fine, are not applicable to a conviction under the Liquor Tax Law; that, as the latter statute covers the whole subject, prescribing the punishment and the manner in which the fine shall be

collected, the penalty imposed must be in accordance with that statute, and that in such a case, where the defendant was convicted and fined, and, in the alternative, ordered sent to the penitentiary not exceeding one day for each dollar imposed as a fine, was void, to the extent of the imprisonment, and that the defendant was entitled to his discharge.

Under any circumstances I should feel bound to follow these decisions, being parallel to the case under consideration, if I had no personal opinion upon the question, but I am strongly of the opinion that these cases express the true rule of law upon this question, and that a defendant convicted under this statute can not be imprisoned as a condition for the nonpayment of a fine imposed by the court.

It follows, therefore, that the relator must be discharged from his imprisonment, and it is ordered accordingly.

Ordered accordingly.

Second Appellate Department, May, 1898. Reported. 29 App. Div. 624.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* JOHN SEAMAN, Appellant.

This is an appeal from an order denying defendant's application for a certificate to remove the prosecution of a charge against him for violation of section 31 of the Liquor Tax Law, from a Court of Special Sessions to the Grand Jury of Queens county, pursuant to section 1406 of the charter of the city of New York.

Frederick L. Gilbert, of counsel for appellant.

Appellant is entitled to a trial by jury and in a Court of Record having jurisdiction of crimes of the grade of felony. The *People v. McMahon*, unreported decision of Andrews, J. S. C.; *Wynehamer v. People*, 13 N. Y. 378; *People v. Johnson*, 2 Parker's Rep. 322; *Warren v. People*, 3 Parker's Rep. 544; *Hill v. People*, 20 N. Y. 363.

The provisions of subdivision 1 of section 35 of the Liquor Tax Law have not been repealed directly or by implication either by section 1406 of the Greater New York Charter or otherwise.

(*Bowen v. Lease*, 5 Hill, 221; *Rochester et al. v. Barnes*, 26 Barb. 657; *Excelsior Petroleum Co. v. Embury*, 67 Barb. 261; *People ex rel. Kingsland v. Palmer*, 52 N. Y. 83; *Mongeon v. People*, 55 N. Y. 613; *U. S. v. Chaflin*, 97 U. S. 546.)

William J. Youngs, attorney for respondent.

Daniel Underhill, Jr., of counsel.

Section 1406 of the charter of the City of New York supersedes section 35 of the Liquor Tax Law, within the city of New York.

Board of Excise Comm. v. Burtis, 103 N. Y. 136; *Lyddy v. L. I. City*, 104 N. Y. 218; *Heckman v. Pinckney*, 81 N. Y. 211; *Bowen v. Lease*, 5 Hill, 221; *People v. Brooklyn*, 69 N. Y. 605.

It is proper to consider the title of a statute in considering its purposes and meaning. *People ex rel. Collins v. Spicer*, 99 N. Y. 225; *People ex rel. Jackson v. Potter*, 47 N. Y. 375.

The charter and the Liquor Tax Law are to be considered together. *Smith v. The People*, 47 N. Y. 330; *Chase v. Lord*, 77 N. Y. 18; *People ex rel. Van Riper v. N. Y. Cath. Protectory*, 106 N. Y. 614; *In re Livingstone*, 121 N. Y. 104.

The defendant has not a constitutional right to a trial by jury. *U. S. v. Cruickshank*, 92 U. S. 542; *People v. Penhollow*, 5 N. Y. Crim. Rep. 42; *People ex rel. Comaford v. Dutcher*, 83 N. Y. 240; *People ex rel. Murray v. Justices of Special Sessions*, 77 N. Y. 406; *People v. Rawson*, 61 Barb. 619; *Devine v. People*, 20 Hun, 98.

Appeal dismissed on argument.

All concurred.

First Appellate Department, May, 1898. Reported. 29 App. Div. 390.

In the Matter of the Application of HENRY H. LYMAN, Respondent, for an Order Revoking and Canceling Liquor Tax Certificate No. 6080, Granted to HENRY KORNDORFER, Appellant.

Liquor Tax Law—Use for the sale of liquor of a building within the prohibited distance from a church.

A building rented by an unincorporated society, having a president, vice-president, secretary and treasurer, whose purpose is "to preach and teach the truth, as it is revealed in the Bible, the Word of God," in which building, since July 5, 1896, religious services have been held on Sunday and at stated times during the week, together with Sunday school, at which ministers of the Christian Protestant faith officiate, is a building used exclusively as a church within the meaning of the Liquor Tax Law; and where, upon an application made under section 28 of the law for the cancellation of a certificate upon the ground that the statements contained in the application therefor were untrue, and that the place at which the business was carried on was within the prohibited distance from a building used exclusively as a church, it appears that, although the premises had, under a license granted in May, 1895, been occupied as a saloon up to April 2, 1896, the certificate had then been surrendered, the sale of liquor discontinued, and that the premises had remained vacant for more than a year thereafter, at the expiration of which time they were opened as a hotel by the present occupant, by whom a renewal of the license was obtained, such renewal is in violation of the statutory provision prohibiting the carrying on of the liquor business within 200 feet of a church.

APPEAL by Henry Korndorfer from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 22d day of November, 1897, revoking and canceling liquor tax certificate No. 6080, granted to Henry Korndorfer.

William S. Andrews, for the appellant.

Royal R. Scott, for the respondent.

Order affirmed, with twenty-five dollars costs and disbursements, on the opinion of the court below, and on the authority of *People ex rel. Bagley v. Hamilton* (25 App. Div. 428).

Present — VAN BRUNT, P. J., BARRETT, RUMSEY, INGRAHAM and McLAUGHLIN, JJ.

The following is the opinion of the court below:

STOVER, J. This is an application under section 28 of the Liquor Tax Law (Chap. 112, Laws of 1896) for the cancellation of a certificate upon the ground that the statements contained in the application are untrue, and that the place at which the business was carried on was within the prohibited distance of a building used exclusively as a church. The application was verified on the 4th day of June, 1897, for permission to carry on the business at 2013 Boston road. It appears from the testimony that a license had been issued by the old excise board in May, 1895, and that the premises were occupied as a saloon up to April, 1896, when the license was surrendered, the surrender being on the 2d day of April, 1896. From the time of the surrender down to June 9 or 12, 1897, no liquor traffic was carried on at the place, and the premises were vacant. The premises 2011 Boston road had been used for business purposes up to the 15th of June, 1896, at which time they were hired by the society; on the fifth of July they were opened, and since that time have been used exclusively for religious services, consisting of religious discourses or sermons by laymen and by ministers, the objects and purposes of the society being stated by its officers to be "To preach and teach the truth as it is revealed in the Bible, the Word of God." It is called the West Farms Mission, holding religious services on Sunday, and at stated times during the week, together with Sunday school, at which various ministers of the Christian Protestant faith officiate. Of these facts there is no dispute, but it is claimed by the respondent that the answer stating that the liquor traffic could be legally carried on there was not untrue, because the traffic was being carried on on the 23d of March, 1896. The business proposed to be carried on by the respondent was that of hotel keeper and not of a saloon keeper. Under the decisions (*Matter of Zinzow*, 18 Misc. Rep. 653, and *People ex rel. Cairns v. Murray*, 148 N. Y. 171), whenever the licensee discontinued business the exemption ceased and the place could not obtain a liquor tax certificate. In the case under consideration, business had been suspended for a long time, and in the meantime the premises have been refitted for the purposes of the new business that was to be carried on, so that if the building 2011 was used exclusively as a church, the answer was not a true one, and a liquor tax certificate could not legally issue for the

premises 2013. It is strenuously insisted by the respondent that these facts do not disclose that the building is used exclusively as a church. In *People ex rel. Gentile v. Board of Excise*, (7 Misc. Rep. 415) it was said that a liberal construction of the Excise Law was to be indulged in, and citing Kent's Commentaries: "It was held to be the duty of the judges to make such a construction as should repress the mischief and advance the remedy." (1 Kent Com. 464.) The law does not undertake to define or restrict the definition of the words "occupied exclusively as a church," and I think it must be left to such reasonable construction as will accomplish the purpose intended by the Legislature, viz., to prevent the traffic of liquor in proximity to such class of buildings. Under the laws of this State it is not necessary that a religious society should be incorporated, nor is it necessary that they should hold to any particular tenets or creed; but great liberality and tolerance is given in the organization of religious societies and the promulgation of religious beliefs. The evidence here shows that this is a society having a president, vice-president, secretary and treasurer. They occupy these premises exclusively for the teaching of the Gospel and such services as are usually carried on by church societies. So that it may well be said that this building is used exclusively as a church; that is, a place where a religious society holds its stated meetings for the purposes of religious observances and teachings in accordance with the Christian faith. How long this has continued, or how long it may continue, is immaterial under the statute. It had continued for some considerable time before the application here was filed, and the fact that it did exist at the time of filing the application for the certificate is sufficient to protect it from the proximity of a place where the traffic of liquor is carried on. It follows that the answers were untrue; that the traffic of liquor can not be legally carried on at 2013 Boston road, and the certificate must be canceled.

Order signed.

Third Appellate Department, May, 1898. Reported. 30 App. Div. 62.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* MICHAEL J. DIPPOLD, Appellant.

Violation of the Liquor Tax Law—Charge as to the weight which the good character of the defendant should have—Good faith of parties ordering a meal at which the liquor was furnished.

In a criminal action a charge by the court that "proof of good character is of absolutely no weight as a defense, if the jury are satisfied beyond a reasonable doubt, arising from all the evidence, that a man charged with crime has actually committed it," is not erroneous, as by the use of the words "all the evidence," the jury is necessarily called upon to consider the evidence of the man's character.

In an action in which the defendant was convicted of selling liquor upon Sunday, in violation of the provisions of section 31 of the Liquor Tax Law (Chap. 112 of the Laws of 1896, as amended by chap. 312 of the Laws of 1897), the main questions were whether the defendant kept a hotel, and, if so, whether the liquor sold was sold to a guest of the hotel.

Held, that the element of good faith was involved, and that the court did not err in submitting to the jury the evidence as to the good faith of the parties who were claimed to have ordered the meal, in the course of which it was alleged by the defendant that the liquor was furnished.

APPEAL by the defendant, Michael J. Dippold, from a judgment of the County Court of Ulster county in favor of the plaintiff, entered in the office of the clerk of the county of Ulster on the 17th day of December, 1897, upon the verdict of a jury convicting him of a violation of subdivision a of section 31 of the Liquor Tax Law.

Brinnier & Newcomb and John F. Cloonan, for the Appellant.

Charles F. Cantine, District Attorney, for the Respondent.

MERWIN, J.: The defendant was convicted of selling liquor upon Sunday in violation of the provisions of section 31 of the Liquor Tax Law (Chap. 112 of the Laws of 1896, as amended by chap. 312 of the Laws of 1897).

The defendant claims that the court erroneously instructed the jury as to the weight and consideration that should be given to the good character of the defendant; erroneously submitted to the jury evidence as to the good faith of the party or parties who, it

was claimed, ordered and obtained a meal, and also made divers errors in its rulings upon evidence. No exception was taken by the defendant to the charge, but the defendant claims the benefit of the provisions of section 527 of the Code of Criminal Procedure which allows the granting of a new trial in the interest of justice, though no exception has been taken.

1. In the course of its charge the court said: "It has been proven that this defendant is a man of good character, and gentlemen of the highest business and social standing in the city have testified that his character was excellent and irreproachable. The trend of this testimony is to strengthen the presumption of innocence. It does not necessarily prove that he is innocent, but that the proof is introduced to show that men of good character are far less apt to commit crimes than men of bad character. But proof of good character is of absolutely no weight as a defense if the jury are satisfied beyond a reasonable doubt arising from all the evidence that a man charged with crime has actually committed it."

The court had previously charged as follows: "The law presumes every man innocent until he is proven guilty by all the evidence in the case to the satisfaction of the jury, beyond a reasonable doubt arising from all the evidence, and the burden never shifts from the prosecution to the defense. It remains with the prosecution from the beginning to the end of the trial, and the prosecution is obliged to satisfy the jury beyond a reasonable doubt arising from all the evidence of the truth of every fact which they charge, the proof of which is necessary to justify a conviction."

The court thus emphasized the idea that all the evidence must be taken into account in determining whether or not there was a reasonable doubt as to the guilt of defendant, and did not, as in some of the cases cited by the counsel for the defendant, exclude the evidence of good character in determining that question. And then, after referring to the good character of defendant and its natural effect, the court said to the jury that if, after a consideration of all the evidence, they were satisfied of the guilt of defendant beyond a reasonable doubt, the proof of good character was not a defense. This direction to the jury to consider all the evidence necessarily called upon them to consider the evidence of character along with the other evidence, and it was only in the contingency of the conclusion of guilt upon all

the evidence, good character with the rest, that the fact of good character was declared to be unavailing. In this view the charge was not erroneous. There was no doubt as to the meaning of the court; and if, to the mind of the counsel, there was any uncertainty about it, the attention of the court should have been called to it. There is no ground for saying that the jury were misled.

This is not like the case of *Remsen v. People* (43 N. Y. 6), where a charge that, in substance, took from the jury the consideration of good character when looking at the other evidence in the case upon the subject of the guilt of the defendant was held to be erroneous. (See *People v. Sweeney*, 133 N. Y. 611.) Nor do the other cases cited by the counsel for the defendant reach the question here. No error on the part of the court is shown.

2. The main questions in the case upon the facts were whether the defendant kept a hotel within the meaning of the law, and if he did whether the liquor, claimed to have been sold by him, was sold to a guest of the hotel. There was evidence tending to show one sale for the joint benefit of four people, and that the liquor was used by them together in connection with what was claimed to be a meal. By section 31 of the act, as amended in 1897, a guest of a hotel is defined to be:

"2. A person who, during the hours when meals are regularly served therein, resorts to the hotel for the purpose of obtaining, and actually orders and obtains at such time, in good faith, a meal therein."

The element of good faith is involved in this definition, and the court did not, we think, err in submitting to the jury evidence as to the good faith of the party or parties who ordered the meal in question.

3. The defendant claims that the court erred in denying the motion of defendant to strike out the evidence of a witness that certain books showed that beer was sold to the defendant. Inasmuch as the witness testified, apparently from his own knowledge, that the defendant paid the bill, it is difficult to see how the defendant was harmed by the ruling.

The defendant claims that the court erred in admitting in evidence a letter written by a son of the defendant, in the name of the defendant, to the mayor of the city, and certifying that the defendant had all the requisites necessary under the Raines Law to run a hotel. The son testified that on the morning of the day

in question he went to see the mayor, and at his suggestion wrote and delivered to him the letter; and the mayor testified that he delivered it to the chief of police. The son had no special authority from the defendant to write the letter. He, however, testified that upon that day he was in the employ of the defendant, and that his duty was to see that everything ran right there; that he was there to look around and see that everything was served and done right. Assuming that the letter may have been objectionable, it was merely a statement of the attitude of the defendant, as claimed by the defendant on the day in question, and as he claimed at the trial it in fact was. It is not apparent how a statement of the defendant's position, in a manner entirely correct according to his claim then and now, affected any substantial right of the defendant. (Code Crim. Proc. § 542.)

Nor did the court err in refusing to strike out the testimony of the witness Atkins as to the transaction because he testified that Mr. Linson gave the order, while previous witnesses had testified that the order was given by Mr. Wieber. There was but one transaction and one sale. It was not material which one of the four gave the order.

We have examined the other questions raised by the defendant and find no good reason for reversal.

All concurred, except HERRICK, J., not sitting.

Judgment affirmed.

Third Appellate Department. May, 1898. Reported, 30 App. Div. 135.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM H. D. SWEET, Appellant, v. HENRY H. LYMAN, State Commissioner of Excise of the State of New York, Respondent.

Civil service—The appointing power may decline to make a probationary appointment absolute—Such refusal is not a "removal" within the meaning of chapter 821 of 1896.

The Civil Service Act (Laws of 1883, chap. 354), providing for a period of probation before an appointment shall be made absolute, limits the term of the appointment thereunder to the probationary period fixed by the civil service rules, and confers authority upon the appointing power to refuse, at the expiration of the probationary period, to make the appointment absolute if it determines that the probationary appointee is not qualified for the position.

A refusal to make the appointment absolute is not a "removal" of the probationary appointee from his position within the meaning of chapter 821 of the Laws of 1896, declaring that no honorably discharged Union soldier, holding a position by appointment or employment, "shall be removed from such position or employment except for incompetency or misconduct shown, after a hearing upon due notice, upon the charge made, and with the right to such employee or appointee to a review by writ of certiorari."

Herrick, J., dissented.

APPEAL by the relator, William H. D. Sweet, from an order of the Supreme Court, made at the Ulster Special Term and entered in the office of the clerk of the county of Albany on the 18th day of May, 1897, denying the relator's motion for a peremptory writ of mandamus to compel the said Henry H. Lyman, State Commissioner of Excise of the State of New York, to reinstate the relator in the position of special agent in the excise department.

The relator, an honorably discharged Union soldier, having successfully passed the civil service examination required by the provisions of chapter 354, Laws of 1883, and another examination required by the defendant, received from the latter the following communication:

"OFFICE OF DEPARTMENT OF EXCISE.

"ALBANY, Sept. 25th, 1896.

"TO WILLIAM H. D. SWEET,

"19 N. Y. C. Avenue, Albany, N. Y.:

"This is to inform you that, under the provisions of the Civil Service Rules, I have selected you for appointment to the position of special agent in this Department for a probationary term of three months from the date when you begin service. Should your conduct and efficiency during such probationary term prove satisfactory, you will, at its close, receive a regular appointment; otherwise your employment will cease. The salary attached to such position is at the rate of \$1,200 per annum.

"This conditional appointment does not preclude prompt discharge from service at any time during such probationary term, in case of misconduct or inefficiency.

"A prompt reply is requested, stating whether this appointment is accepted, and giving the earliest date when you can present yourself for service.

"Very respectfully,

"H. H. LYMAN, *State Com. of Excise.*"

Having accepted the appointment, the relator, on the same day, was formally appointed to the office of special agent, and thereafter entered upon the duties of said position at Ogdensburgh.

About December 19, 1896, he received from the defendant the following letter:

“ALBANY, Dec. 19th, 1896.

“MR. W. H. D. SWEET, Ogdensburgh, N. Y.:

“DEAR SIR.—I have to inform you that your efficiency and capacity for the work required of a special agent, during your employment in this department for a probationary term of three months, have not been found satisfactory, and that in accordance with the terms of your original appointment, as prescribed in the civil service rule No. 36, your employment by this department will cease on the 23d day of December, 1896.

“Yours, respectfully,

“H. H. LYMAN, *State Commissioner of Excise.*”

Since the 23d day of December, 1896, the relator has not received any assignment of duty from the department of excise, and he has been informed by the defendant that he would not thereafter be employed.

The relator thereafter applied to the court below for a peremptory writ of mandamus directed to the defendant, commanding him to reinstate said relator in the position of special agent in the department of excise, and to take such action as might be necessary to audit his claim for services since the 23d day of December, 1896.

On the hearing of the motion for a mandamus, the State Commissioner of Excise read an affidavit which alleged want of qualification, and incapacity and unfitness on the part of the relator for the office in question.

The motion for a peremptory writ of mandamus was denied in the court below, and from the order thereupon entered the relator has appealed to this court.

Eugene D. Flanigan, for the appellant.

T. E. Hancock, Attorney-General, and *G. D. B. Hasbrouck*, Deputy Attorney-General, for the respondent.

PUTNAM, J. By the provisions of chapter 354, Laws of 1883, the Governor was authorized to appoint three Civil Service Commissioners who were authorized to aid the Governor in promulgating rules for carrying the act into effect. The statute provides for open, competitive examinations for testing the fitness of applicants for the public service; that appointments should be made from those graded highest as the result of such competitive examinations; that "there shall be a period of probation before any absolute appointment or employment aforesaid."

In pursuance of and within the power conferred by the statute in question, the Governor promulgated the following rule: "Every original appointment or employment in the civil service shall be for a probationary term of three months, at the end of which time, if the conduct and capacity of the person appointed or employed shall have been found satisfactory, the petitioner shall be absolutely appointed or employed, but otherwise his appointment shall cease."

The appointment of relator for the probationary period of three months was, therefore, authorized. His term continued for such period and ended with its expiration. If he was competent and had not been guilty of misconduct, at the expiration of the three months, he was undoubtedly legally entitled to a reappointment. Whether he was or was not competent, was for the defendant to decide. The act provides: "Notice shall be given in writing by the appointing power to said commission of the person selected for appointment or employment from among those who have been examined, of the place of residence of such persons, of the rejection of any such persons after probation," etc. This provision evidently contemplates that the appointing power shall have the power to reject an applicant for an office after probation.

Hence the probationary appointment of the relator for three months was authorized by the act of 1883. At the end of that period the defendant had the power to decline to reappoint him, if not qualified for the position, and to pass on the question of such qualification.

The question in the case is whether the provision of chapter 821, Laws of 1896, amending chapter 312 of the Laws of 1884, which provides that no honorably discharged Union soldier holding a position by appointment or employment "shall be removed from such position or employment except for incompetency or

misconduct shown, *after a hearing upon due notice upon the charge made*, and with the right to such employee or appointee to a review by writ of certiorari," applies to this case.

The relator was not removed from any position. He was properly and legally appointed to the position of special agent for three months, and at the expiration of his term the State Commissioner of Excise declined to make an absolute appointment. If the construction placed upon the act of 1883 by the learned counsel for the appellant is correct, it deprives the provision of that statute, that there shall be a period of probation before an absolute appointment is made, of all force and effect. As he construes the act, in the case of an honorably discharged Union soldier, there can be no probationary appointment; the original appointment although stated to be for three months, is in effect an absolute one for an unlimited period, as the appointee can not be deprived of the office at the expiration of the probationary period, unless for the same reason and after the same procedure as if the appointment was an absolute one, and for an unlimited period.

While the question as to the construction that should be given to chapter 821, Laws of 1896, is not entirely clear, we are disposed to think its provisions relating to the removal from office of a Union soldier were not intended to apply to the case of one to whom the State Commissioner of Excise declined to give an absolute appointment after the expiration of the probationary period. We do not regard such declination as a removal. The act no more applies to such a case than it would have applied to the act of the defendant had he, after the relator's successful civil service examination, refused to make the probationary appointment.

It may be said that if an appointing officer of the State can in such a case as this, after a probationary period, arbitrarily, without notice to the appointee, and without giving him an opportunity to produce proofs as to his capacity, or to be heard in the matter, decline to give him an absolute appointment, such officer has the power to defeat the purpose of the Civil Service Act. We think, however, that in this case, if the relator was competent and had not been guilty of misconduct during the probationary period, and was entitled to an absolute appointment, that he was not without a remedy. At the expiration of his original appointment for three months he could, alleging the facts, and that he was

qualified to perform the duties of special agent, and had been guilty of no misconduct, have applied for an alternative writ of mandamus. Had the defendant denied his competency, that question could have been tried in such proceeding. Had it been determined in favor of the relator, he would have been entitled to a peremptory writ compelling the State Commissioner of Excise to give him an absolute appointment (Chap. 821, Laws of 1896), and under the provisions of the act of 1896, in such proceeding, the burden would have been upon the defendant to show the relator's incompetency.

On the hearing of the motion for a peremptory mandamus below, the defendant read an affidavit which, if true, showed that the relator was incompetent for the position of special agent, and that the State Excise Commissioner properly declined to reappoint him. On this appeal we are compelled to assume that the averments in the defendant's opposing affidavit are true, and that the relator was in fact incompetent to discharge the duties of the position of special excise agent. (*People ex rel. Corrigan v. The Mayor, etc.*, 149 N. Y. 215; *Matter of Haebler v. N. Y. Produce Exchange*, Id. 414; *People ex rel. Port Chester Savings Bank v. Cromwell*, 102 id. 477.)

When the defendant read the affidavit alleging the relator's incompetency, we think the latter should have asked for an alternative writ and obtained a trial. If on such trial the defendant had failed to show the incompetency of the relator for the position of special agent in the excise department, an order requiring the State Commissioner of Excise to give him an absolute appointment might have been properly granted.

We are of opinion that the relator has not been removed from a position or employment within the meaning of chapter 821, Laws of 1896, and, hence, that the order should be affirmed, with costs.

All concurred, except HERRICK, J., dissenting.

LANDON, J.: I concur in the result. The only appointment which the relator received was a probationary one of three months. As that expired by its own limitation, he was not removed from office, and, therefore, can not invoke chapter 821, Laws of 1896, which secures him from arbitrary removal during the term for which he was appointed. All he can complain of is

that he was not at the end of the probationary appointment absolutely appointed. Civil service rule 36 says that, to entitle him to such absolute appointment, his conduct and capacity "shall have been found satisfactory." The relator has not shown that his conduct and capacity have been found satisfactory, but is confronted with the defendant's finding the other way. The relator, therefore, has not shown his clear legal right to an absolute appointment. But I think it was for the appointing power to pass upon his conduct and capacity during the probationary period, for the reason that if the defendant had found them satisfactory, it was his duty to appoint him absolutely, and this power for the purpose of absolute appointment implies the power to find either way. Such finding was in its nature a judicial act, and can not be reviewed upon mandamus.

HERRICK, J. (dissenting) :

I am unable to concur either in the reasoning or result of Mr. Justice PUTNAM's and Mr. Justice LANDON's opinions.

Section 9 of article 5 of the Constitution provides that appointments in the civil service of the State, and in the different subdivisions thereof, shall be made according to merit and fitness, to be ascertained as far as practicable by competitive examinations; and it further provides "that honorably discharged soldiers and sailors from the army and navy of the United States, in the late civil war, who are citizens and residents of this State, shall be entitled to preference in appointment and promotion without regard to their standing on any list from which such appointment or promotion may be made."

The Court of Appeals has held that it is "clear that this section of the Constitution, read according to its letter and spirit, contemplates that in all examinations, competitive and non-competitive, the veterans of the civil war have no preference over other citizens of the State, but when, as the result of those examinations, a list is made up from which appointments and promotions can be made, consisting of those whose merit and fitness have been duly ascertained, then the veteran is entitled to preference, without regard to his standing on that list." (*Matter of Keymer*, 148 N. Y. 219, 225.)

Prior to the adoption of this provision of the Constitution, various laws had been passed providing for preference to veterans. None of these laws, however, prevented veterans who had once

been appointed from being summarily removed; to remedy that defect in the law the then existing statute (Laws of 1884, chap. 312) was amended by chapter 716 of the Laws of 1894, which provided that removals could not be made except for incompetency and conduct inconsistent with the position held by the employee or appointee. It was held, however, that, under this law, it was left to the appointing power to determine whether the facts existed which authorized a removal, subject to responsibility for any willful or perverse action; and that no notice or opportunity to be heard was required to be given to the person whose removal was contemplated before the power could be exercised. (*People ex rel. Fonda v. Morton* 148 N. Y. 156.)

To remedy the defect in the statute which was revealed by the decision of the case of *People ex rel. Fonda v. Morton*, the statute in relation to veterans was further amended by chapter 821 of the Laws of 1896, which provided that no veteran holding a position by appointment or employment in the State of New York, or in any of the subdivisions thereof, should be removed from such position or employment, "except for incompetency or misconduct shown, after a hearing, upon due notice, upon the charge made."

At the time the relator was removed from office the Constitution provided that veterans who had passed a civil service examination should be given a preference in employment or appointment, and the statute provided that one holding a position by employment or appointment could not be removed, except upon charges, and after notice of such charges and opportunity to be heard thereon.

It is to be presumed that the framers of the Constitution and the people who adopted it were in earnest in including this provision in reference to veterans of the late civil war, and intended that it should be complied with, and it is presumed that a like intent moved the Legislature in the passage of a statute which requires notice and an opportunity to be heard before such a person shall be removed from his employment or appointment; that neither the constitutional or statutory provisions were intended to be mere empty sentiments, sounding in patriotism and gratitude, but meaning nothing, but were intended to enforce a practical and substantial recognition of the loyal services of those who preserved the government from destruction; and both the Constitution and the statute should be interpreted and construed to effectuate that intent.

Neither the officers whose duty it is to execute the laws, nor

the courts whose duty it is to interpret them, should be astute to discover ways and means whereby the letter of the Constitution and the statute may be observed, but the spirit violated, and any statute in conflict with the Constitution, in spirit or in its results, should be disregarded as void, and any construction of a statute which enables the spirit of the Constitution or a statute to be evaded, should be frowned upon and rejected.

The reason given by the defendant for not giving the relator notice, is that he was never appointed. Having passed his competitive examination, it was the defendant's duty, under the Constitution, to appoint him; the appointment he did give him will be presumed to have been made pursuant to the Constitution, and holding a position by virtue of such appointment he can only be removed therefrom pursuant to the statute, and the defendant cannot be permitted to assert his disobedience of the Constitution as a reason why he is not bound by the requirements of the statute.

The preference given by the Constitution is an absolute preference to employment or appointment — an absolute appointment or employment, not a conditional or probationary one.

The only limitation is that the veteran shall have passed a competitive examination for merit and fitness; that is the only examination, the only test required. The Legislature has no power to add to that requirement of the Constitution, and having complied with it the veteran is entitled to be employed or appointed.

Chapter 821 of the Laws of 1896 provides for the manner of revoking or terminating such appointment or employment.

The result of his civil service examination has presumptively shown his merit and fitness, and secured him his employment or appointment; and before he can be removed it must be by his own misconduct, or by showing by actual demonstration that the result of his examination was incorrect or misleading, and that he is, in truth, unfit and incompetent, and upon those questions he is entitled to be heard.

If the practice indulged in in this case is to be upheld, then the appointment of a veteran who has passed his civil service examination can be prevented, and no preference, in fact, given to him; or, if it is held that he has had his preference under the Constitution by this probationary appointment, then he has been removed from the position he acquired by virtue of the provisions

of the Constitution, without notice and without a hearing, as the statute provides, and thus a way is pointed out by which a veteran can be removed from the civil service list without receiving any appointment.

If the probationary appointment, so-called, is not a final appointment which entitles the person appointed to hold his position unless removed upon charges, in the manner pointed out by the statute, then such final appointment is not an appointment made according to merit and fitness ascertained by competitive examinations, as the Constitution requires, but is one resulting from his conduct during his probationary term, such conduct being a sort of examination, necessarily non-competitive, and, therefore, not in accordance with the Constitution. Then, too, this latter examination is made and the result passed upon by the appointing officer.

The Court of Appeals, in answer to the argument that in counties, towns and villages where no examiners have been provided, or provisions made for carrying the Constitution into effect, each officer having appointments to make could himself examine the applicants for positions, and in that way determine who should be appointees by a competitive examination, said: "Undoubtedly, but it will readily be seen that this system would practically nullify the Civil Service Law and bring it into disrepute." (*Chittenden v. Wurster*, 152 N. Y. 345, 356.)

How much more will it tend to nullify and bring the law into disrepute where the appointing officer is conducting an examination which is non-competitive and of the result of which he is the sole and only judge, and where, upon charges of incompetency and unfitness, he is at once the accuser, witness and judge, and where the result is open to the suspicion, at least, that it is a mere arbitrary determination of the appointing officer that he does not want to employ or appoint the man in question. An interpretation that will practically nullify or bring a law into disrepute is to be avoided.

It is claimed, however, that the relator, by accepting the appointment tendered him, waived his right, if he had any, to an absolute appointment, because it is said that any statutory or even constitutional right can be waived.

I do not think that contention can prevail.

A waiver, to be effectual, must be intentional; must be made with full knowledge of the rights waived and with full knowledge

that such rights are being waived. And no element of coercion must enter into it; if the last is present, and either or both of the others are absent, the waiver is not effectual.

There are cases where the acts of the parties, although without knowledge of their rights, will in law constitute a waiver, as when the law makes such acts a waiver, or when the other party will be, or has been, placed in a disadvantageous position through such action. But the general rule as to waiver is as I have stated.

There can be no claim here that this case comes within any of the exceptions to the general rule.

There can be no pretense here that the relator intended to waive any of his rights under the Constitution or the statute, or that he knew he was doing so.

Can we say that the relator knew the full measure of his rights and knew what he was waiving? This court has been embarrassed in determining what they are. How can we say that he knew and waived them? Can we say that the element of coercion was lacking here?

The applicant for employment is not upon an equal footing with the employer; he is seeking position or employment; he recognizes that he is largely at the mercy of the one appointing or employing, and that a refusal to take what is tendered may, and probably will, result in depriving him of any employment or position.

What could the relator do in this case but accept what was offered to him, go to work and rely upon the law afterwards to protect him in the full measure of his rights.

To recapitulate, the naked facts of the case are, that the relator, an honorably discharged soldier, who served as such during the war of the rebellion, passed a competitive examination; that as a result of such examination he received an appointment in the civil service of the State; call it whatever kind of appointment you please, it was an appointment, and pursuant to it he held a salaried position in the State service. The statute (§ 1, chap. 821, Laws of 1896) provides that no such person "holding a position by appointment or employment in the State of New York * * * shall be removed from such position or employment, except for incompetency or misconduct shown, after a hearing upon due notice," etc. He was removed from that position because of alleged incompetency without notice and without a hearing. It is claimed that he was not removed, but that the

appointing officer declined to give him a permanent appointment because of his incompetency, the language of the officer being "that your efficiency and capacity for the work required * * * have not been found satisfactory. * * * Your employment by this department will cease on the 23d day of December, 1896."

Call it by what name you please, a refusal to make a permanent appointment or a cessation of employment, the fact remains that the relator was deprived of the employment he was engaged in under the State for alleged incompetency, without notice or opportunity to be heard.

The result seems to me not simply an evasive but a plain, palpable violation of the statute, and nullification of the spirit and intent of the Constitution. _

The order should be reversed and the application of the relator granted.

Order affirmed, with ten dollars costs and disbursements.

A motion having been made for a reargument of this case, the following opinion was written.

PER CURIAM: In one of the opinions delivered in this case it was said that "The relator was not removed from any position. He was properly and legally appointed to the position of special agent for three months, and, at the expiration of his term, the State Commissioner of Excise declined to make an absolute appointment. * * * We are of opinion that the relator has not been removed from a position or employment within the meaning of chapter 821, Laws of 1896, and, hence, that the order should be affirmed, with costs." The above quotation shows what was intended to be decided.

In the opinion referred to, treating this proceeding as an application of the relator to compel his absolute appointment by the defendant as a special agent of the excise department of the State, and not one to reinstate him in an office that had expired, it was suggested that, in a proceeding by mandamus under the provisions of chapter 821, Laws of 1896, the question of the business capacity of the relator could be tried and determined. This suggestion, however, was not considered by the court, and must be regarded merely as an opinion of the justice who delivered the opinion.

What this court determined was, that "the only appointment which the relator received was a probationary one of three months. As that expired by its own limitation, he was not removed from office, and, therefore, cannot invoke chapter 821, Laws of 1896, which secures him from arbitrary removal during the term for which he was appointed."

The motion should be denied, but, under the circumstances, without costs.

All concurred, except PUTNAM and HERRICK, JJ., dissenting.

PUTNAM, J. (dissenting): In my examination of the questions raised by the appeal in this case, I reached the conclusion that the relator, having been appointed by the defendant as agent, for the period of three months, and having accepted such appointment, has not been removed from the office. He has been retained by the defendant during the term for which he was employed, and, hence, the provisions of chapter 821, Laws of 1896, in reference to removals from office, did not apply to his case. But I was also of the opinion that, considering the relator's application as one to compel an absolute appointment, while he was not entitled to a peremptory writ of mandamus in consequence of the affidavit read by the defendant, which, if the relator's application was one merely for a peremptory mandamus, we were compelled to regard as true, he would have been entitled to an alternative writ under the provisions of the act of 1896, had he asked for that relief. My attention was not then called to the fact that the relator did ask, in case his motion for a peremptory writ of mandamus should not be granted, for an alternative writ. I think, therefore, our order should be set aside, and one granted modifying that of the court below so as to provide for granting the prayer of the relator for an alternative writ.

Motion for reargument denied.

Court of Appeals. Reported. 155 N. Y. 702.

In the Matter of the Petition of GEORGE HILLIARD, Special Deputy Commissioner of Excise, Appellant, *v.* ANNIE GIESE, Respondent.

Matter of Hilliard, 25 App. Div. 222 affirmed. (Submitted April 19, 1898; decided May 3, 1898.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 3, 1898, reversing an order of Special Term granting an injunction.

N. N. Stranahan and Alfred B. Page for Appellant.

Arthur Furber and Charles L. Hoffman for Respondent.

Order affirmed, with costs; no opinion. All concur.

Supreme Court, New York Special Term. Reported, N. Y. L. J., June, 1898.

HENRY H. LYMAN *v.* PLYMOUTH SOCIAL CLUB AND AMERICAN SURETY COMPANY.

HENRY H. LYMAN *v.* UNITY LEAGUE AND AMERICAN SURETY COMPANY.

BISCHOFF, JR., J.: Actions by Commissioner of Excise against holders of liquor tax certificates, and their sureties, to recover amount of penalty stated in bond for violation of the Liquor Tax Law. Motions that complaints be made more definite and certain and to strike out certain allegations, also that causes of action be separately stated. The allegations as to the maintenance of a disorderly place in each instance, appear to be proper in form, and if the defendants are entitled to further particularity as to the exact days, during the period specified, upon which the premises were maintained in a disorderly manner, relief should be had by motion for a bill of particulars. So far as it is alleged, however, that such maintenance of the premises was "in violation of

the Liquor Tax Law and a breach of the conditions of the bonds," the averments are irrevelant as the mere statement of a conclusion of law and should be stricken out. (*Village of Cortland v. Howard*, 1 App. Div. R., 131.) Where the complaints proceed upon sales of liquors the facts showing that the persons to whom the liquor was sold were persons to whom the defendant principal was not allowed to make such sales should be stated, and in these instances the statement that the sales were "in violation of" the particular restrictions should be stricken out. (Case last cited.) I can not hold that the several alleged violations of the Liquor Law, as set forth in the complaint, constitute separate causes of action. But one cause of action is alleged—the breach of the condition of the bond—and but one amount is recoverable by the plaintiff in these actions for one or for all of these violations, and the presence of several cumulative grounds for the breach of the condition of the bond does not render the complaint severable into more than one cause of action; and so it was ruled in *The State v. Davis* (35 Mo., 406), which was an action to recover upon a sheriff's bond, the complaint alleging several breaches thereof and in *Fiske v. Tank* (12 Wis., 276), where the plaintiff sought to recover for breach of a contract, alleging that the contract was broken in two respects and demanding damages for each breach.

Motion granted, so far as indicated, without costs.

Supreme Court, Onondaga Special Term, June, 1898. Reported. 23 Misc. 710.

Matter of the Petition of HENRY H. LYMAN, State Commissioner of Excise, for an Order Revoking and Canceling the Liquor Tax Certificate of CHARLES A. GILLET.

1. Liquor Tax Law—Application—False statement as to the number of dwellings for which consents must be filed.

The Liquor Tax Law (Laws of 1896, chap. 112, § 17, subd. 8, as amended by Laws of 1897, chap. 312), does not require an applicant to state how many buildings, used exclusively as dwellings, are within the prescribed statutory distance of the proposed saloon and for which consents must be filed, and hence a false statement in the application as to the number of such buildings affords no ground for a revocation of the certificate, as the statement is not "material."

2. Same—

A statement, in such an application, that the applicant may "lawfully carry on such traffic in liquors on such premises" does not relate to the subject of dwelling-houses, but refers to the provisions of section 24 of the statute, prohibiting traffic in certain places.

3. Same—Review of determination of county treasurer—Former adjudication.

The court has power, in view of subdivision 2 of section 28 of the statute, to review and correct the action of a county treasurer in issuing a liquor tax certificate to a person who, as matter of fact, did not obtain a sufficient number of necessary consents of the owners of dwelling-houses, and hence, while this issue should in the first instance be determined by the county treasurer, his conclusion, although reached after a protest by the owners of the buildings, has not the force of a former determination, available as a bar.

APPLICATION for an order revoking and canceling a liquor tax certificate.

Mead & Stranahan, for application.

Walter Welch, opposed.

HISCOCK, J.: The holder of the certificate made application therefor under subdivision 1, section 11, Liquor Tax Law, in the usual form to the county treasurer of Onondaga county, who granted the same.

The ground upon which it is asked to have the certificate revoked is that there were seven buildings used exclusively for dwellings within the distance prescribed by subdivision 8, section 17, of said law, while the applicant stated in his application that there were only three, and filed under said subdivision 8 the consents for only three.

It is pretty clear that the four additional buildings enumerated by the petitioner were all used as dwelling-houses within the meaning of the statute, as claimed by him. It could not have been the intention of the statute that a dwelling-house should lose its character and become a boarding-house or public place of business, because of such insignificant and incidental facts as were developed by the evidence in relation to the Newell and Woodward houses. The use of the Morris house in part for a physician's office had been discontinued before the certificate in question was granted.

Assuming, therefore, that there were seven houses within the meaning of subdivision 8, section 17; that the applicant's statement that there were three was false, and that he did not have and file the necessary consents to entitle him to the certificate, we reach the question whether the petitioner is entitled to have the same canceled as requested.

The application is made, of course, under section 28, of the Liquor Tax Law, and petitioner urges as two grounds for the cancellation, first, that a material statement in the application, viz., that relating to the number of dwelling-houses above discussed, was false; and, second, that the applicant is not entitled to hold such certificate by reason of his failure to file the necessary consents.

I do not think that the application can be granted upon the first ground. The only "material" statement for whose falsity the certificate could be revoked would be one which the applicant was required by law to make. The official charged with the duty of issuing certificates would not have the power by inserting questions outside of those authorized by the statute to lay the possible foundation for false statements and a subsequent revocation of the certificate. There is nothing in the statute which provides for a statement by the applicant of the number of dwellings for which consents must be filed. He is simply required to file the consents and whether they are sufficient in number is a question for determination very likely, as a matter of convenience, to be aided, but not controlled, by his statements. *People ex rel. Anderson v. Hoag*, 11 App. Div. 74.

Neither does the statement in the application that the applicant may "lawfully carry on such traffic in liquors on such premises," relate to this subject of dwelling-houses. That manifestly refers to the provisions of section 24, prohibiting the traffic in liquors in certain places.

Upon the second ground, however, that the applicant was not and is not entitled to the certificate by reason of failure to obtain the necessary consents, the relief asked for should be granted unless one of the contentions of the defendant now to be considered is well founded.

It appears that after the application for the certificate was presented to the county treasurer a protest was also presented to him in behalf of the owners of the dwelling-houses in question raising the same issue of lack of necessary consents which is

involved in this proceeding. Thereafter the county treasurer, notwithstanding such remonstrance, issued the certificate, and it is claimed that his action was judicial and a bar to this proceeding.

I think that under the provisions of section 19, as amended by chapter 312, Laws of 1897, the county treasurer was called upon to determine as a question of fact whether the necessary consents had been obtained; that as before suggested this was not one of the matters which the application was required to disclose upon its face, and that even if it did purport to do so the county treasurer was not bound thereby. This provision was not one which the treasurer was required or permitted to disregard to the end of issuing a certificate under the clause requiring him to so issue when the application "does not show on the face thereof that the applicant is prohibited from trafficking in liquor."

But all this being so, the question still remains whether this court in this proceeding cannot in effect review and correct the act of the treasurer in issuing a certificate when he should not have done so. Ordinarily such review by anybody at least who was legally a party to the proceedings would be by *certiorari* as suggested by defendant's counsel. But the Legislature in treating this subject, of course had the power to provide for what should in effect be a review of the acts of a treasurer by a proceeding other than *certiorari*, and at the instance of persons who would not have any standing to institute the latter. It seems to have done so. Subdivision 2, section 28, seems to have provided in the most comprehensive language possible that "at any time" after a certificate has been granted "any citizen of the State" may institute a proceeding such as this to have revoked a certificate upon the broad general ground, in addition to those specifically enumerated, that the holder "was not entitled to receive or is not entitled * * * for any * * * reason to hold such certificate." It is the general rule that only parties and privies to a determination are bound by it, and independent of the language used, specifically combatting such an intention, it would be somewhat anomalous for the statute to give "any citizen" the right to question the validity of an issue of a certificate and then bind him by a decision of an officer in a proceeding of which very probably he never heard until after its conclusion.

The case of *People ex rel. Anderson v. Hoag*, cited by defend-

ant's counsel, does not seem to conflict with this holding. That proceeding was by *certiorari* under other provisions than those quoted (if under this statute at all), and by the applicant, who, of course, was a party to the proceeding before the treasurer. Under the wording of the statute in that proceeding the court applied the ordinary rule of determination in bar.

These views lead to an order canceling and revoking the certificate in question.

Costs are allowed to the petitioner to the amount of disbursements actually incurred in the proceeding, including referee's fees to be taxed by the clerk and also \$50 counsel fee.

Ordered accordingly.

Supreme Court, Amsterdam Chambers, June, 1898. Reported. 24 Misc. 1.

In the Matter of the Application of DAVID D. STEENBURGH et al.,
for a Writ of *Certiorari*, etc.

Liquor Tax Law—The commissioner can not arbitrarily fix the population of a village.

Where there has been no State, nor United States, census taken in a village, or any enumeration of its population made, under the Liquor Tax Law (Laws of 1896, chap. 112), by the State Excise Commissioner, the fact that he has "no doubt" that its population exceeds twelve hundred can not justify the action of a county treasurer in exacting \$75 from a village applicant for a liquor tax certificate, and the proper fee is \$50. The provisions of subdivision 7 of section 11 of the statute, authorizing the commissioner to make an enumeration "if the commissioner has any doubt as to the number of the population as affecting the amount of the excise tax assessed therein," merely mean that, if he has any doubt about the population, he may make an enumeration, and does not mean that he, in the absence of such an enumeration, may arbitrarily fix the population and the consequent tax.

CERTIORARI to review the action of a county treasurer in refusing a certificate, permitting the relator to engage in the traffic of liquors.

J. W. Atkinson, for petitioner.

Nussbaum & Coughlin, for respondent.

STOVER, J. Writ of *certiorari* to review the action of the county treasurer in refusing a certificate, permitting the relator to engage in the traffic of liquors.

The relator tendered to the county treasurer the sum of \$50, and requested the issuance to him of a certificate. The certificate was refused, upon the ground that the relator should have tendered \$75, instead of \$50.

There is no contention that the population of the village of Waterford, the place within which the relator proposed to carry on the business, has been fixed, either by a State census or a United States census; and no enumeration of the village has been made by the Commissioner of Excise under subdivision 7 of section 11 of the Liquor Tax Law.

By subdivision 2 of section 11 of the Liquor Tax Law, it is provided that the tax for carrying on the business in a city or village having at the last State census a population of less than 5,000, but more than 1,200, shall be \$75. By other provisions of the same section, a graded license, based upon the population as ascertained by the last State census, is provided for. And it is further provided that "in any other place" the tax shall be \$50. "Any other place," as used in this connection, refers to a place, the population of which has not been fixed by a State census. By subdivision 7 of section 11, it is provided: "When the population of a city or village is not shown by the last State census, it shall be determined for the purposes of this act by the last United States census, and if not shown by reason of the incorporation of a new city or village, or by reason of not having been separately enumerated, the state commissioner of excise is authorized and directed to cause an enumeration of the inhabitants to be taken in such city or village, if the commissioner has any doubt as to the number of the population as affecting the amount of the excise tax assessed therein."

If is conceded upon the argument of this motion that there has been neither a State nor United States census of the village of Waterford, and that the commissioner of excise has not made an enumeration of said village. But the claim is made that the commissioner had no doubt as to the population of the village of Waterford, and, therefore, he had a right to fix the sum to be paid for a license, at \$75, as he had no doubt that the population exceeded 1,200.

It is impossible for me to bring my mind to a concurrence in this

interpretation of the statute. The object of the statute was to classify the cities, villages, hamlets and towns of the State, so that any person desiring to obtain a certificate permitting him to engage in business, might know the amount that he would be required to pay; and this was not to be left to chance or the arbitrary determination of any individual. It was to be based, first upon the State census; in the absence of a State census, upon a United States census; and in the absence of both, a general classification was made, viz.: "any other place"; that is, a place where there had not been a census. This classification was complete, and except in instances where the commissioner might have doubt as to the correctness of this classification, because there had been a new incorporation or because there had never been a separate enumeration, he was permitted to make a new census, and to take an enumeration of the inhabitants. If, upon such enumeration, it appeared that the population was greater or less, whichever it might be, the enumeration taken by the commissioner was to control until there was a census taken by the State or Federal authorities. The law nowhere gives the commissioner power to classify, or to fix the tax for a certificate. If it can be said that the commissioner may, wherever he has doubt as to the number of inhabitants in a locality in which a census has not been taken, change the amount of tax which might otherwise be paid, he might as well say he had no doubt there were over 5,000 people in a locality as to say he had no doubt there were over 1,200; because, if this interpretation is to prevail, the statute has left him as the ultimate arbiter as to the number of inhabitants within such localities. I can not believe that this was the intention of the law, for it would absolutely prevent any review of the action of the commissioner when he has once acted. How can it be determined that he had no doubt? Who is to pass upon the question, and upon what is the review to be based? Under well-known rules of interpretation, where discretion is left to an official, and that has been once exercised, there is no power to review it. Here, the commissioner, by simply stating that through his mental operations, he had no doubt that there were a larger number of inhabitants than was contended for by the applicant, and he, therefore, fixed the tax at the larger amount, would completely foreclose any review of his action. For it will be noticed that the statute does not make it depend upon the fact as to whether there was or was not a larger number,

but as to whether he had any doubt. But a further inspection will show that that doubt which is to influence his action, is only to influence his action in the taking of a census or enumeration. If he has any doubt, he may have the inhabitants enumerated, but the statute nowhere gives him power to go beyond this and fix the tax which ought to be paid, in the absence of an enumeration. He may have no doubt as to the fact, and he is not called upon to explain the reason why he has an enumeration made, and so far as the statute gives him power in making the enumeration, he can not be interfered with. If he has doubt, he may have the enumeration made, and if, upon that enumeration, the population warrants, the tax may be collected accordingly. But this is as far as his discretion can go. He has no right, in the absence of an enumeration, to fix the tax, or to refuse a certificate to one who would otherwise be entitled to it.

This disposes of the only question that was at issue in the case, and it follows that the applicant is entitled to the certificate demanded.

Ordered accordingly.

Court of Appeals, June, 1898. Reported. 156 N. Y. 407.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. EDWIN G. S. MILLER, Appellant, v. HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Respondent.

1. Liquor Tax Law—Assignment of certificate as security—Right of assignee to rebate defeasible by violation of law by assignor.

If a liquor tax certificate, assigned by the original owner as collateral security, by an instrument empowering the assignee to surrender the certificate and receive the rebate thereon, is surrendered by the assignee and a rebate receipt issued to him, the right to payment of the rebate is suspended, by force of section 25 of the Liquor Tax Law (L. 1896, chap. 112, amd. L. 1897, chap. 312), by the arrest of the original owner of the certificate for a violation of that law, within thirty days from the date of the rebate receipt.

2. Violation of law by copartnership.

A violation of the Liquor Tax Law by one of a firm holding a certificate is a violation by the firm and subjects it to the restrictions upon the right of rebate prescribed by section 25, through the prosecution of the offending partner.

3. Certificate issued to firm assigned as security—Right of assignee to rebate, suspended by violation of law by member of firm.

If a liquor tax certificate, issued to a firm and assigned as collateral security, is surrendered by the assignee, under a power given by the assignment, and a rebate receipt is issued to him, the arrest, within thirty days thereafter, of one of the firm for a violation of the Liquor Tax Law suspends the right of the assignee to the rebate.

People ex rel. Miller v. Lyman, 27 App. Div. 527, affirmed.

(Argued June 13, 1898; decided June 24, 1898.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 5, 1898, reversing an order of Special Term granting a peremptory writ of mandamus.

The facts, so far as material, are stated in the opinion.

Tracy C. Becker for appellant. When the interests of a holder in a liquor tax certificate have been duly assigned for value to an innocent third party, and that certificate has been surrendered and a duplicate rebate receipt issued to such assignee, he becomes the owner and holder thereof, and unless he is indicted within thirty days the said commissioner of excise has no right whatever to retain the rebate moneys, and refuse to issue the orders for the payment thereof to the proper city and State officers. (Black on Intoxicating Liquors, § 188; L. 1896, ch. 112, § 27, as amended by L. 1897, ch. 312; *Matter of Jenney*, 19 Misc. Rep. 246; *Niles v. Mathusa*, 19 Misc. Rep. 96; *Herman v. Goodson*, 18 Misc. Rep. 604.) The indictment of a member of a corporation or of a copartnership holding a license or liquor tax certificate, within thirty days after it has been surrendered and the duplicate rebate receipt issued to such firm, is not an indictment of "the person surrendering such certificate," within the meaning of the provisions of section 25 of the Excise Law, in reference to the surrender of such certificates and the payment of rebate moneys. (Excise Law, § 23, subds. 5, 7; *Bank of Buffalo v. Thompson*, 121 N. Y. 280.)

Royal R. Scott for respondent. The State commissioner contends that, as Henry Stauber was indicted and arrested within thirty days from the date of the receipt of the tax certificate by him, said commissioner, the petition for surrender should not be granted until the final determination of such proceeding or

action. (Liquor Tax Law, § 25; Black on Intoxicating Liquors, § 188; 50 N. Y. Supp. 977; *Matter of Johnson*, 18 Misc. Rep. 498; *Matter of Bradley*, 22 Misc. Rep. 301; *People ex rel. v. Murray*, 149 N. Y. 367; *People v. Durante*, 19 App. Div. 292; *Matter of Livingston*, 24 App. Div. 51; Liquor Tax Law, § 34, subd. 2; *Bagley v. Hamilton*, 25 App. Div. 428.) The assignment to Miller was only an equitable assignment, and his title was not perfected. (Liquor Tax Law, § 27.)

GRAY, J. This appeal presents a question of construction of certain provisions of chapter 112 of the Laws of 1896, as amended by chapter 312 of the Laws of 1897; being acts passed by the Legislature in relation to the traffic in liquors within this State.

In May, 1897, the excise department of the State issued to the firm of Floss & Stauber a liquor tax certificate, authorizing them to sell, in the city of Buffalo, ales, wines, beer and spirituous liquors; a payment being then made by them of the sum of \$500, as the amount of the tax assessed under the statute. Prior to their application for this certificate and by an instrument, dated April 30th, 1897, which recited the fact of the application having been made and that Miller, this relator, had advanced certain moneys to enable them to pay the tax required, they assigned to him their rights under the tax certificate, including the right to surrender and cancel the same and to receive any moneys due upon such surrender and cancellation. On July 1st, 1897, the relator made application, as the assignee and the attorney in fact of Floss & Stauber, to the deputy excise commissioner to surrender the said tax certificate and he received a receipt for the same as for cancellation; in which was stated the amount of the rebate payable upon such surrender. On July 19th, 1897, Henry Stauber, one of the firm of Floss & Stauber, was indicted for a violation of the statute on July 11th, 1897, and on July 21st, 1897, was arrested and upon being arraigned on July 29th, following, entered a plea of not guilty. The trial under the indictment had not been had at the commencement of this proceeding. The proceeding was instituted, upon the refusal of the State commissioner of excise, respondent herein, to pay the excise tax rebate, to obtain a peremptory writ of mandamus requiring him to do so. The answer interposed by the commissioner set up the violation by Stauber of the Liquor Tax Law and his arrest therefor and claimed that by reason thereof

the petitioner and the said Floss & Stauber were not entitled to the orders for the payment of the excise tax rebate.

At the Special Term of the Supreme Court the application for the writ was granted; but the order granting the same was reversed by the Appellate Division and the writ was dismissed. It was held at the Appellate Division that the violation of the Liquor Tax Law by one of the firm of Floss & Stauber, within thirty days after the surrender of the liquor tax certificate, deprived the assignee thereof of the right to the rebate. The proposition thus decided presents the principal question for our review.

The statute, of which some of the provisions are thus brought up for consideration, created a general and comprehensive system for the regulation and taxation of the traffic in liquors within this State. It prescribed the conditions under which the same may be carried on and provided for a supervision by a State commissioner of excise, who performs the duties pertaining to his office with the aid of special deputies and agents in the various counties. The provisions of the statute go much beyond those of former excise laws; in that they permit the holder of a liquor tax certificate to surrender the same for cancellation and to be allowed a rebate upon the tax paid therefor, and they permit him to make a voluntary sale, assignment or transfer thereof during the time for which it was granted. These new provisions lend a commercial value to the certificate which is issued, in addition to the privilege conferred of trafficking in liquors; for the holder not only is able to receive a rebate upon the amount of the tax paid, if he desires to discontinue the liquor business, but the certificate is valuable to him as a means of raising money by its sale or pledge. In the system, however, created by the statute, conditions are imposed which qualify the absolute right to receive payment of the rebate upon the surrender of the certificate. The particular condition now demanding our attention in this case is as follows, viz.: "If within thirty days from the date of the receipt of such certificate by the State Commissioner of Excise, the person surrendering such certificate shall be arrested or indicted for a violation of the Liquor Tax Law, or proceedings shall be instituted for the cancellation of such certificate, or an action shall be commenced against him for penalties, such petition shall not be granted until the final determination of such proceedings or action"; etc. (Sec. 25.) The

clause, from which I have quoted, continues by providing that a conviction cancels the certificate and forfeits the rebate. If, in the present case, the transaction between Floss & Stauber and Miller, the petitioner, had been that of an actual sale of the certificate to the latter, the question of his right to receive payment of the rebate upon his surrender thereof, as affected by the subsequent proceedings against Stauber for a violation of the law, might be a very different one. The transaction in question, however, was not that of a sale, but that of an assignment to secure Miller in advancing to Floss & Stauber the moneys with which to pay the tax. Instead, therefore, of occupying the situation of a purchaser of the certificate, with the attendant right to carry on the business for which it was issued, in which case, by the terms of the statute, he would stand as an original applicant for and original owner of the certificate, his situation was that merely of an assignee thereof, who held it as collateral security for the repayment of his advances. He, therefore, was subject to the same conditions which attended the ownership of his assignors, to whom the certificate had been issued. On July 1st, 1897, the time when the petitioner Miller made application to surrender the certificate and to receive the rebate due thereon, Floss & Stauber stood towards the State Commissioner of Excise as the parties holding the certificate and trafficking thereunder, and upon the surrender thereof, though made by a party appearing as their assignee or attorney in fact, with power to surrender and receive payment of the rebate, the right with respect to such a payment was no greater than was possessed by Floss & Stauber. The rights conferred by the possession of the certificate were measured by the statute. The statute created a new and marketable privilege; subject, however, to restrictions and conditions affecting both its exercise and its value. The language of the statute above referred to is unmistakable in forfeiting the rebate, where, within thirty days from the date of the receipt of the certificate, the person surrendering it shall be arrested for a violation of the Liquor Tax Law. Now the "person surrendering the certificate" in the present case was not, in a legal sense, Miller; notwithstanding that by the instrument of assignment he was invested with the power to surrender it and to receive payment of the rebate. There having been no sale of the certificate, Floss & Stauber, to whom it was issued, were the parties to be

affected by the cancellation. As a license granted to traffic in liquors, all rights or privileges pertaining thereto were made to depend upon the *status* of the holder under the statute. It seems to me very plain that Miller, as assignee, took the certificate subject to the conditions and restrictions, with which the holding of the same by Floss & Stauber was invested and, thus, when he elected to surrender the same in order to receive the rebate due thereon, his right to the payment was conditional and dependent upon the completion of the thirty days thereafter without a violation of the law by Floss & Stauber.

I am unable to see that the argument of the learned counsel for the appellant, that the proviso at the end of section 27, to the effect that no sale, assignment or transfer of a liquor tax certificate shall be made, except in accordance with the provisions of the Liquor Tax Law, nor permitted by any holder of a certificate who shall be convicted, or be under an indictment, etc., constitutes the sole limitation upon the right of the holder of the certificate to sell and transfer it, is of any avail. That proviso was intended as a restriction upon the right accorded by the statute to the holder to sell or transfer liquor tax certificates. It in nowise impairs the effect of the conditional clause in section 25, heretofore referred to. If the petitioner was the transferee by purchase, as before suggested, his position might be a very different one under the act.

I think the Appellate Division was clearly right in the view of the question discussed; as it was, also, upon the question of whether the indictment of a member of the partnership of Floss & Stauber was an indictment of the person surrendering the certificate, within the meaning of the provisions of section 25. The violation by Stauber of the Excise Law, for which he was subsequently arrested and indicted, affected the partnership itself and made it amenable to the provisions of the law. The partnership could only act through the agency of its members and it would be absurd to hold that where, in the conduct of the business, one of them had violated the statute, the copartnership would not incur the attendant penalty. The copartnership may well be a legal entity; but that by no means imports that, in order to cancel its license to do business under the law, it must be indicted as such. A violation of the statute by one of the copartners is, in legal effect, a violation by the copartnership and

subjects it to the forfeiture of the right to the rebate, prescribed by section 25.

The order should be affirmed, with costs.

All concur, except PARKER, Ch. J., and HAIGHT, J., dissenting.

Order affirmed.

Court of Appeals. Reported. 156 N. Y. 691.

In the Matter of the Petition of FRANK PLACE, Respondent, for an Order Revoking Liquor Tax Certificate of FRANK MATTY Appellant.

Matter of Place, 27 App. Div. 561, affirmed. (Argued June 7, 1898; decided June 21, 1898.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 6, 1898, reversing an order of Special Term dismissing the above entitled proceedings, and revoking the liquor tax certificate held by appellant.

James Devine, for appellant.

S. B. Mead for respondent.

Order affirmed, with costs; no opinion.

All concur, except O'BRIEN, J., absent.

Second Appellate Department, July, 1898. Reported. 32 App. Div. 272.

ANCHOR BREWING COMPANY, Appellant, v. BERNARD BURNS, Defendant, Impleaded with GEORGE RINGLER & Co., Respondent.

Liquor tax certificate—Assignment thereof in advance of its issue—Right of a subsequent assignee who advances the cost thereof—City Court of Yonkers—Action therein, how regarded in view of its want of equitable jurisdiction.

A brewing company which has advanced money to enable a person to take out a liquor tax certificate for the year beginning May, 1896, and to whom the licensee (the holder of the certificate) has given an assignment in the form of a chattel mortgage, by which he sells and assigns "the tax certificate issued to me * * * for the premises known as 48 St. Mary

street, Yonkers, N. Y., and also any and every renewal or subsequent license or tax certificate which may be hereafter issued to me * * * for said premises," is not entitled to a liquor tax certificate issued to the same person for the succeeding year beginning May, 1897, as against a party who has advanced the money necessary to secure such last-mentioned certificate and has taken an assignment thereof as security for the loan thus made.

Semble, that as the City Court of Yonkers has no jurisdiction of equitable actions, an action brought therein by the first assignee to recover the last-mentioned certificate must be regarded as an action at law in replevin, in which form of action no recovery could be had, *first*, because the second certificate not being in existence at the time of the execution of the chattel mortgage, that instrument created no lien thereon, but simply operated as a contract to give a lien, only effectual in equity as between the parties when the property came into existence, provided no rights of creditors or innocent third parties intervened; *second*, because the tax certificate being not a chattel, but a chose in action, the recovery of the paper itself would be of no advantage to the plaintiff unless accompanied by an assignment thereof, which latter instrument the City Court of Yonkers could not compel the debtor to execute.

APPEAL by the plaintiff, the Anchor Brewing Company, from a final judgment of the City Court of Yonkers in favor of the defendant George Ringler & Co., entered in the office of the clerk of the City Court of Yonkers on the 3d day of May, 1898, upon the decision of the judge of the City Court of Yonkers rendered after a trial at a term of said court before the court without a jury, dismissing the plaintiff's complaint upon the merits and also from an interlocutory judgment entered in said clerk's office on the 15th day of January, 1898, overruling the plaintiff's demurrer to the answer of the defendant George Ringler & Co.

I. J. Beaudrias, for the appellant.

F. X. Donoghue, for the respondent.

CULLEN, J. In April, 1896, the plaintiff lent the defendant Burns \$300, to enable the latter to take out a liquor tax certificate, and Burns executed an assignment to the plaintiff in the form of a chattel mortgage, whereby he sold and assigned "the tax certificate issued to me * * * for the premises known as 48 St. Mary Street, Yonkers, N. Y., and also any and every renewal, or subsequent license or tax certificate, which may be hereafter issued to me * * * for said premises." This cer-

tificate expired in May, 1897. In April, 1897, the defendant Ringler & Co. lent Burns the sum of \$350 to enable him to take out a new license for the year running from May, 1897, to May, 1898, and Burns assigned such certificate to the defendant Ringler & Co. as security for the loan. Burns paid neither the plaintiff nor Ringler & Co. In November, 1897, the plaintiff brought this action against the defendant Burns to recover possession of the liquor tax certificate for the year 1897 to 1898, or its value (\$150), in case return could not be had. On motion, Ringler & Co. were made parties defendant. The action was tried before the city judge of Yonkers without a jury, and from his decision in favor of the defendants this appeal is taken.

We are of the opinion that the action cannot be maintained. It is strictly an action at law in replevin, and must be considered as such, for the City Court of Yonkers has no jurisdiction of equitable actions. At the time of the execution of the mortgage by Burns to the plaintiff, the license, or tax certificate, for the year 1897 to 1898 was not in existence. The mortgage did not, at the time of its execution, create a lien on the certificate, because that was not *in esse*; at most, it operated as a contract to give a lien. This is effectual in equity, as between the parties, when the property comes into existence and no rights of creditors or innocent third parties intervene. (*Kribbs v. Alford*, 120 N. Y. 519; *Deeley v. Dwight*, 132 id. 59.) We do not understand, however, that such a contract gives any legal title or lien, cognizable in a court of law, as the foundation of a cause of action (*Hale v. Omaha National Bank*, 49 N. Y. 626); though, unquestionably, it could be set up as a defense, since equitable defenses are, under the present system, admissible in legal actions. (*McCaffrey v. Woodin*, 65 N. Y. 459.) In *Hale v. Omaha National Bank*, as in the present case, the lien sought to be enforced was on subsequently acquired property. There Judge ALLEN said: "Very likely the action cannot be maintained as a common-law action of trover, although it is not necessary to pass upon that question. That action can only be brought by one having the legal title, either as a special or a general owner, one having the legal right to the possession." But there is a further difficulty in this case. The tax certificate is not a chattel but a chose in action. (*Niles v. Mathusa*, 20 App. Div. 483.) The recovery of the piece of paper on which the license is written would be of no advantage to the plaintiff. In its complaint it alleges a demand on the

defendant Burns for an assignment of the certificate and Burns' refusal. The City Court of Yonkers has no power to compel Burns to execute any assignment. Therefore, even if an action of replevin would lie in the case of an equitable lien on a chattel, it cannot be maintained in the case of a chose in action.

We are further of opinion that the decision of the city judge was correct on the merits. Equity will only enforce a lien on subsequently acquired property, where superior equities of third parties have not intervened. In this case as Ringler & Co. advanced the very money which paid for the tax license or certificate in suit, their equity was paramount to that of the plaintiff's.

The judgment appealed from should be affirmed, with costs.

All concurred, except HATCH, J., absent.

Judgment affirmed, with costs.

Second Appellate Department, July, 1898. Reported. 32 App. Div. 354.

EDWARD GING, Respondent, *v.* JOHN SHERRY, as County Treasurer of Suffolk County, Appellant.

Intoxicating liquor—Payment of a rebate receipt, how enforced.

A rebate receipt given by a county treasurer to repay an excess of payment exacted, and made, for a liquor tax certificate, can be enforced only in the manner prescribed by section 25 of chapter 112 of the Laws of 1896, as amended by chapter 312 of the Laws of 1897.

APPEAL by the defendant, John Sherry, as county treasurer of Suffolk county, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Suffolk on the 29th day of November, 1897, upon the decision of the court rendered after a trial before the court without a jury at the Suffolk Trial Term.

John M. Ward, for the appellant.

Timothy M. Griffing, for the respondent.

WOODWARD, J.: On or about the 1st day of May, 1896, Albert M. Darling, then county treasurer of Suffolk county, issued liquor tax certificate No. 26251 to the plaintiff, receiving in payment therefor the sum of \$200. On the tenth day of July — plaintiff having, in the meantime discovered that, under the provisions of the Liquor Tax Law, he was required to pay only \$100 for his tax certificate—a notice was served upon the county treasurer of Suffolk county to retain all of the money paid to him, in excess of \$100, for the said tax certificate, and to return the same to the plaintiff. Subsequently, and on the 5th day of February, 1897, the defendant in this action, who had, in the meantime, succeeded to the office of county treasurer of Suffolk county, notified this plaintiff that, acting under instructions from the excise department, the original tax certificate would be received by him, and a new certificate, covering the same period, would be issued, and that the plaintiff would be given a rebate receipt for the difference between the \$100 which should have been paid and the \$200 which was, in fact, paid. Acting under this suggestion, plaintiff surrendered his original liquor tax certificate and was given a new certificate. He, at the same time, accepted from the defendant a rebate receipt, which reads: "Received, this fifth day of March, 1897, from Edward Ging, of the village of Greenport, in the county of Suffolk, N. Y., surrendered Liquor Tax Certificate No. 26,251, issued for \$200, under subdivision No. 1 (series of 1896), on which there is a balance of *pro rata* rebate of \$100 from May 1, 1896, to April 30, 1897 (full months), payable from any excise money hereafter received from said city or town, or in any other manner hereafter legalized." On May 28, 1897, the plaintiff presented said receipt to the defendant, and demanded the payment thereof. Payment was refused, the defendant stating that he had been instructed not to pay the rebate; that he could not pay it. The defendant admitted that he had received moneys from the town of Southold, but that he had paid it over as directed by law, and the trial court (a jury being waived) found in favor of the plaintiff, and from the judgment entered this appeal comes to this court, the defendant relying upon the question of law involved.

It was found in the practical operations of the Liquor Tax Law of 1896 (Chap. 112), that there was great difficulty in harmonizing the provisions of sections 25 and 13. Section 25 provides for the surrender and cancellation of these liquor tax certificates, and

for the refunding of that portion of the tax which is not earned at the time of such surrender; and section 13 directs that the moneys collected shall be turned over to the several funds within a short period, so that the officers who were directed to refund the moneys were without the funds to comply with the law. The excise department, to meet this situation, devised the system of rebate receipts, one of which was given to the plaintiff in this action; and the Legislature, in 1897, enacted that "All outstanding receipts, issued and given for liquor tax certificates, heretofore surrendered and canceled, shall also be paid in the manner above provided for the payment of rebate moneys upon certificates hereafter surrendered and canceled, upon the order of the said State Commissioner, to be issued by the said commissioner upon the surrender of such receipt to him, accompanied by the verified petition of the holder of such receipt, setting forth the facts that the holder of said canceled certificate, at the time of the surrender and cancellation thereof, had not violated any of the provisions of the Liquor Tax Law, and has not been arrested or indicted for any such violation." (§ 25, chap. 112, Laws of 1896, as amended by chap. 312, Laws of 1897.) This statute, enacted at the suggestion of the State Commissioner of Excise, was designed to provide for the payment of rebates, and the mere fact that in the case at bar the rebate was for money paid in excess of the legal rate does not change the rights of the parties, nor does it serve to give this plaintiff a cause of action against the county treasurer of Suffolk county. The receipt given to the plaintiff provides that the rebate shall be "payable from any excise money hereafter received from said city or town, *or in any other manner hereafter legalized.*" The Legislature has since that time legalized a particular method for reimbursing those who have these rebate receipts, and the plaintiff must, therefore, look to the source pointed out by the law for his money.

There is no reason to doubt that the plaintiff in this action has had the advantages of a liquor tax certificate equal to those who have in other localities paid \$200 for the same. The village in which he is located unquestionably has a population in excess of 1,200 inhabitants, but the statute requires that this fact shall appear by either the last State or the last National census, and he was technically entitled to the tax certificate on payment of \$100. He has surrendered his original certificate, and has taken the receipt of the county treasurer, which entitles him to a rebate,

and the law points out a method of payment. We are unable to see that he has any equities in the premises which would warrant this court in sustaining a judgment in his favor against the county treasurer; and as he has his remedy under the law, as amended in 1897, we conclude that the judgment should be reversed and the complaint dismissed, with costs.

All concurred.

Judgment reversed and complaint dismissed, with costs.

First Appellate Department, August, 1898. Reported. 33 App. Div. 130.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Appellant, *v.* BROADWAY GARDEN HOTEL AND CAFE COMPANY and FIDELITY AND DEPOSIT COMPANY of Maryland, Respondents.

Intoxicating liquor—Action on a bond given to secure a liquor tax certificate—When the complaint states but a single cause of action.

A complaint in an action on a bond given to the People of the State of New York to secure a liquor tax certificate, which avers a number of specific breaches of the various conditions of the bond, contains but a single cause of action.

APPEAL by the plaintiff, Henry H. Lyman, as State Commissioner of Excise of the State of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 6th day of May, 1898, setting aside the plaintiff's complaint and granting him leave to serve an amended complaint.

The complaint is upon a bond given to secure a liquor tax certificate. The bond reads that the parties are held and firmly bound unto The People of the State of New York in the penal sum of \$1,600. The condition is that, if the tax certificate is given unto the principal, he will not, to quote the precise language of the instrument, "while the business for which such Tax Certificate is given shall be carried on, suffer or permit any

gambling to be done in the place designated by the Tax Certificate in which the traffic in liquors is to be carried on, or in any yard, booth or garden appertaining thereto or connected therewith, or suffer or permit said premises to become disorderly, and will not violate any of the provisions of the Liquor Tax Law, or any act amendatory thereof or supplementary thereto; then this obligation shall be void; otherwise it is to be and remain in full force and effect to cover every violation of the Liquor Tax Law and all fines and penalties incurred or imposed thereunder. An action for the breach of any condition of this bond may be maintained without previous conviction or prosecution for violation of any provision of said Liquor Tax Law."

Royal R. Scott, for the appellant.

James R. Soley, for the respondent, Fidelity and Deposit Company of Maryland.

BARRETT, J. But one cause of action is alleged in the complaint. That cause of action is upon a single instrument to recover the sum named therein. The plaintiff has averred a number of specific breaches of the various conditions of this bond. These breaches, however, do not constitute separate causes of action. They are simply separate assignments of the specific breaches upon which judgment for the single sum is demanded. The defendant seems to think that the correctness of the order made below depends upon the question whether the amount in the bond is to be regarded as a penalty or as liquidated damages. This view is erroneous. It matters not whether the recovery be limited to the damages sustained by the various breaches alleged, or whether the sum named in the bond be treated as liquidated damages. In either aspect the cause of action is single. The action must not be confused with one to recover statutory penalties. It is upon the surety's contract to pay a specific sum of money. A right of action inures upon the breach of any one of the conditions of the bond. The cause of action is the same upon the breach of all the conditions. The recovery may, it is true, be greater or less, dependent upon the proper view of the sum specified. With that question we have at present nothing to do. Whether it be a penalty or liquidated damages, there is still but a single cause of action alleged in the complaint.

The order should, therefore, be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

VAN BRUNT, P. J., RUMSEY, O'BRIEN and McLAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

Supreme Court, New York Special Term, August, 1898. Reported.
24 Misc. 469.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* MARK LEVY
et al., Defendants.

1. Greater New York charter—Certificate that a misdemeanor should be prosecuted by indictment.

A certificate will not be granted, under the Greater New York charter (Laws of 1897, chap. 378, § 1406) by a justice of the Supreme Court, that it is reasonable that a charge of misdemeanor, upon which a defendant has been held for trial at the Court of Special Sessions of the second division of the city of New York, should be prosecuted by indictment, except in a case where exceptional features render a jury trial proper, or where a fair trial cannot be had at the Special Sessions.

2. A misdemeanant is not entitled to a jury trial.

In view of the provisions of section 23 of article 6 of the Constitution of 1894, that "Courts of Special Sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law," a statute which deprives a person, charged with a misdemeanor, of the right to a trial by jury can not be held unconstitutional.

MOTIONS for certificates that it is reasonable that the charges of misdemeanors so made shall be prosecuted by indictments.

Asa Bird Gardiner, district attorney, for People.

N. S. Levy, for Mark Levy.

L. Levy, for Hiedeman.

Price & Hoyer, for Codney.

Mark Alter, for Stajer.

Fromme Bros., for Schottler.

BEEKMAN, J. In all of the above cases, the defendants have been charged with misdemeanors, and have been held for trial at the Court of Special Sessions of the Second Division of the city of New York. In each case a motion has been made before me for a certificate that it is reasonable that the charge so made shall be prosecuted by indictment.

The authority for such a motion is found in section 1406 of the Greater New York Charter, which provides that the Court of Special Sessions shall be divested of jurisdiction to proceed with the hearing and determination of any charge of misdemeanor in either of the following cases: First, if before the commencement of the trial in said court a grand jury shall present an indictment for the same offense; second, if before the commencement of such trial a justice of the Supreme Court, in the judicial department where such trial would be had, shall certify that it is reasonable that such charge shall be prosecuted by indictment.

It will be observed that the granting of such an order is largely discretionary, and that the reasons which would justify such a certificate must be something more than the mere preference of the defendant for a jury trial. Facts must be brought to the attention of the judge, to whom the application is made, tending to show that the case is of an exceptional character, and that for some special reason the defendant cannot have a fair trial in the Court of Special Sessions, or that there are exceptional features in the case which render it desirable and proper that the action should be tried before a jury rather than by a justice of the Special Sessions. This, I think, is the plain meaning of the statute. It never was intended that such applications should be granted as a matter of course. This is the more obvious when we consider the condition of the law as it was prior to the enactment of the Greater New York Charter.

By chapter 601 of the Laws of 1895, entitled "An act in relation to the inferior courts of criminal jurisdiction in the city and county of New York" (§ 14), it was provided, among other things, that upon the defendant swearing that he was not guilty of the charge made against him, the justice to whom the application was made should make an order that the charge be proceeded

with before a grand jury. Under such circumstances there was no room for the exercise of judgment or discretion, but the justice was compelled, upon the mere affidavit of the defendant that he was guiltless, to make the order asked for. The motive for the change in the statute, which is embodied in the Greater New York Charter, is apparent, not only upon its face, but also upon a consideration of the effect upon the administration of criminal justice in this county of the compulsory features of the act of 1895. In a great number of cases of misdemeanors orders were obtained, which, as I have said, the court was compelled to grant, ousting the Court of Special Sessions of jurisdiction to try them, to the great embarrassment of the district attorney and the courts of record of criminal jurisdiction. Not only were there great delays in the prosecution of the cases themselves, owing to their multitude, but delays were also occasioned in the prosecution of other cases of felonies, which, of necessity, could only be tried before a jury after indictment. The object of the Legislature in enacting chapter 601 of the Laws of 1895 was to provide for the speedy administration of justice in criminal causes, and to that end to relieve the grand jury and the higher criminal courts from a consideration of petty offenses which had seriously interfered with the more important business properly appertaining to such bodies and tribunals. This purpose, as we have seen, was largely defeated by the mandatory provisions with respect to the transfer of misdemeanors from the Special Sessions to the grand jury, and it was to remedy this mischief that persons charged with misdemeanors are now required to satisfy the judge that there exists some substantial reason why the Court of Special Sessions, which has been constituted by the Legislature for the purpose of trying such offenses, should be deprived of jurisdiction in their particular cases.

Some question has been made with respect to the constitutionality of a law which deprives a person charged with the commission of such an offense of the right of trial by jury. Such an objection as this would have been a substantial one prior to the amendment of section 26 of article 6 of the old Constitution, now embodied in section 23 of article 6 of the present Constitution of this State, which provides that "Courts of Special Sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law." Under this pro-

vision it has been held that the right of trial by jury does not apply to the petty offenses triable before a Court of Special Sessions. *People ex rel. Comaford v. Dutcher*, 83 N. Y. 240.

An examination of the papers in each of these motions, which have been made before me for a certificate under the statute, discloses an utter absence of any averment or proof which would reasonably justify me in granting the relief asked for. In some of them all that the defendant alleges is that he is not guilty of the charge, while in the others the only reason given for the application is that there is a conflict of evidence involving the credibility of witnesses. With respect to the class of cases first mentioned, it is obvious that there is nothing upon which the reasonableness of the application can be determined; in the other class of cases, the reasons assigned are entirely insufficient, and do not come at all within the spirit and intention of the statute. Of course the assumption in all of these cases, where the defendant pleads not guilty, is that there will be a conflict of evidence, and that questions with respect to the credibility of witnesses will arise. These are the ordinary and almost universal characteristics of the trial of all the issues civil and criminal. If such reasons should be accepted as sufficient to warrant the transfer of a case from the Special Sessions, it is plain that every such application would have to be granted, and the purposes of the statutory provision upon the subject which is now in force would be completely nullified.

The motion in each of the above cases is, therefore, denied.

Motions denied.

Supreme Court, New York Special Term. Reported. N. Y. L. J.,
August 1, 1898.

In the Matter of the Application of HENRY H. LYMAN to Revoke
the Liquor Tax Certificate of JOHN FUHRMANN.

MCLEAN, J.: It does not appear, that the dances and entertainments in the Epiphany School, are not for educational purposes, or incidental thereto. The distance between the school and the place occupied for the traffic in liquors, measured according to the requirements of the statute, is within the inhibition of the

statute. The statement of the applicant, that the premises have been continuously occupied for traffic in liquors since 1888, and longer, was untrue; for, while brief interruption, such as for domestic bereavement, might be disregarded, premises (whatever their contents) which have been closed for over a twelvemonth, while the owner is looking for a new purchaser, can not be said to be occupied for the traffic in liquors, within the purview of the act.

Motion granted.

Supreme Court, Ulster Special Term, September, 1898. Reported.
24 Misc. 552.

Matter of the Application of HENRY H. LYMAN for an Order Revoking and Cancelling Liquor Tax Certificate No. 21,780, Issued to NELSON GARRISON.

Liquor Tax Law—Revocation of tax certificate—Consents upon application for tax certificate.

Upon an application to revoke a liquor tax certificate for failure to secure the consent of the required number of owners of dwellings within the limits specified by the act, the court will consider the nature of the dwellings, and where it appears that two rough-board buildings, not lathed or plastered, without chimneys and one without windows, were occupied each by a man without family for the first time on the night prior to the application for the certificate, such buildings and the occupancy thereof is an evasion of the statute, and the certificate will be revoked.

APPLICATION for the revocation of a liquor tax certificate.

Charles F. Cantine, for State Commissioner of Excise, and application.

Benjamin McClung and Graham Witschief, for defendant, opposed.

CLEARWATER, J.: This is an application, under section 28 of the Liquor Tax Law, for the revocation of a certificate.

The principal issue is as to the truth of the allegation that the consent of two-thirds of the owners of the buildings occupied

exclusively as dwellings within 200 feet of the defendant's premises had been obtained by him at the time of making his application.

The act provides that when the nearest entrance to the premises of the applicant is *within* 200 feet measured in a straight line, of the nearest entrance to buildings occupied exclusively for dwellings, there shall be filed simultaneously with the application, a consent in writing that such traffic be carried on, executed by the owners or their agents of at least two-thirds of the total number of such buildings.

A Mr. Bingham is the owner of a dwelling, claimed by the State Commissioner of Excise to be within the 200 feet radius. The defendant's place fronts on Main street in the village of Marlborough, and the door of its nearest entrance is in a recess, twelve inches south of the north line of the building. The distance from the *door* to Bingham's residence is 199 feet; from the *doorstep* it is 200 feet. To hold that the measurement should be taken from the door, instead of the doorstep, would be an overstrained and hypercritical construction of the act, neither in accord with accepted canons of construction as to legislative intent, or that common sense which should guide judicial as well as lay opinion.

The application was made to the county treasurer of Ulster county at about 9 o'clock of the evening of the 5th day of May, 1898, and granted about an hour afterwards. For twelve years prior to that time, a building ten feet long, eight feet wide and seven feet high, composed of rough, unpainted boards, with a single window, and no chimney, standing in the rear of the defendant's premises, had been used as a woodshed. The boards were so loosely joined that it was easy to look into the building through the joints. About midnight of the 5th of May, a man of nomadic life, without family, who had previously slept in a cooper shop, moved into it, and claims to have lived in it since. Another building, of rough hemlock boards, twelve feet long, eight feet wide and seven feet high, without windows or chimney, was at that time built a few feet distant from the woodshed, and on that night for the first, was occupied by a man of migratory habit, also without family, who had previously slept in a small building used for packing berries. Neither building was lathed or plastered. Neither had ever been used as a dwelling. Their construction was of the slightest character, with little, if any

foundation. Both complete cost \$35. They were the property of the owner of the building in which the defendant conducts his business. It is claimed by the defendant that they are dwelling houses within the meaning of this act, and they were so alleged to be in his application.

This law, like any other, should receive a fair interpretation. It should not be construed harshly as against the holder of a certificate, nor interpreted so loosely as to emasculate its restrictive provisions and break down that protection which it gives to adjacent property owners, the public and to the dealer who honestly complies with all its conditions, as against one who seeks to evade it.

It is not the size or the material of which a building is constructed, but the purpose to which it is devoted that is the controlling factor under this statute. A dwelling may be humble and inexpensive, yet as much a domicile as a mansion. But to hold that buildings of this character, tenanted for the first on the eve of an application for a certificate, by men without families or fixed place of abode, are to be regarded as dwellings for the purpose of obtaining and holding a certificate would be farcical. It would be wiser to expunge the provision of the law relative to the consent of owners of dwellings from the statute book, for to retain it and permit it to be evaded by artifices so transparent is to bring the entire legal system of the State into contempt.

These buildings were not dwellings within the provisions of this statute, and to treat them as such was an evasion of the law. Further discussion is unnecessary. As the defendant did not file and had not obtained the requisite consents the statement in his application that he had done so was untrue.

The prayer of the petitioner must be granted, and the certificate revoked, with such costs as are properly taxable in a special proceeding.

Ordered accordingly.

County Court, Otsego County, September, 1898. Reported. 25 Misc. 599.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. IRVING
MULKINS, Appellant.

1. Courts of Special Sessions—Appeal not affected by failure to comply with Code of Criminal Procedure, §752, as amended in 1897.

Where an appeal from the judgment of a Court of Special Sessions has been perfected in accordance with section 755 of the Code of Criminal Procedure, a failure of the defendant or his attorney to comply with section 752 of said code as amended in 1897 and serve, within five days after the appeal is allowed, upon the district attorney a copy of the affidavit upon which the appeal was granted, together with a notice that the same has been allowed, does not affect the validity of the appeal.

2. Crimes—Intoxication in a public place—Arrest without a warrant—Subsequent warrant unnecessary.

A peace officer may, without a warrant, arrest a person for the misdemeanor of being intoxicated in a public place, and where a person thus arrested is brought before the magistrate, it is unnecessary for the latter to then issue a warrant.

3. Courts of Special Sessions—Intoxication in a public place—Not to be prosecuted by indictment.

The Liquor Tax Law, as amended by subdivision 2 of chapter 312 of the Laws of 1897, gives Courts of Special Sessions exclusive jurisdiction to try the offense of intoxication in a public place; there is no provision of law which authorizes a county judge or a justice of the Supreme Court to certify under section 57 of the Code of Criminal Procedure that it is reasonable that such a charge be prosecuted by indictment, and, therefore, a failure of the magistrate to inform the accused that he has such a right is not a ground of error.

APPEAL from a judgment of a Court of Special Sessions, convicting the defendant of the crime of intoxication in a public place.

W. J. Palmer, for appellant.

Tilley Blakely, District Attorney, for respondent.

BARNUM, J. The defendant was arrested by an officer without a warrant and taken before a justice of the peace. An information was made and filed charging the defendant with the crime of being intoxicated in a public place, which is a misdemeanor under chapter 312, section 40, Laws of 1897.

The defendant was committed under plea of guilty, after having been informed by the justice that he was entitled to the aid of counsel and to a jury trial, and was sentenced to confinement in the Albany penitentiary for ninety days, on the 7th day of July, 1898.

An appeal to this court was allowed on the 12th day of July, 1898.

A copy of the affidavit upon which the appeal was allowed was served upon the district attorney, July 20, 1898.

The district attorney asks the court to hold that the appeal was not perfected, and that this court has not acquired jurisdiction of the case, because of the failure to serve copy affidavit and notice of allowance of the appeal upon him within five days after the appeal was allowed, as provided by a clause of section 752 of the Code of Criminal Procedure, which was added to the section by chapter 536 of Laws of 1897, and provides that the defendant or his attorney must within five days after the appeal is granted serve a copy of the affidavit and order upon the district attorney.

The language of the amendment is emphatic, and the Legislature evidently intended that it should have some effect, but no provision is made in the statute prescribing any consequences for a failure to comply with its provisions, nor does it contain language indicating an intent to change any other section of the Code. Section 755, which provides when an appeal shall be deemed taken, was left the same as it has been since it was amended in 1890.

Section 755 provides that the affidavit and allowance of the appeal must be delivered to the magistrate within five days after the allowance of the appeal, and when so delivered the appeal is deemed taken.

It is not necessary at this time to determine what effect can be given to a failure to serve upon the district attorney, as required by the amendment of 1897 to section 752.

I am convinced that its effect is not such as to make it necessary to serve the affidavit and order upon the district attorney before the appeal shall be perfected.

The defendant having complied with the requirements of section 755, the appeal was properly taken, and this court has jurisdiction of the case.

Defendant's counsel contends that the justice should have issued a warrant after the defendant was brought before him,

and that judgment should be reversed because of his failure to do so.

The arrest was properly made without a warrant. Code. Crim. Proc., § 177.

There was no necessity for then issuing a warrant. The office of a warrant is to bring a defendant before the court, and I cannot see any necessity for a preliminary examination for the purpose of determining whether he was properly arrested. That question can be better determined by the trial, which may follow if defendant does not plead guilty.

A warrant if then issued would have commanded the officer to forthwith arrest the defendant and bring him before the magistrate, an entirely useless proceeding at a time when the defendant was already under arrest and before the magistrate on the same charge.

The views above expressed seem to me to be fully sustained by reason and by the authorities. *People ex rel. Gunn v. Webster*, 75 Hun, 281; *People v. Burns*, 19 Misc. Rep. 681.

It is urged that the defendant had the right to apply to a judge of the Supreme Court, or to the county judge of the county, for a certificate that it is reasonable that the charge be prosecuted by indictment, pursuant to section 57 of the Code of Criminal Procedure; and that it was reversible error for the court to omit to inform the defendant, when he was brought before him, that he had the right to make the application.

Section 35 of the Liquor Tax Law, as amended by chapter 312 of Laws of 1897, subdivision 2, provides that "Courts of Special Sessions shall have exclusive jurisdiction to try and determine, according to law, all complaints for violation of section 40. * * * Any person convicted in a Court of Special Sessions for violation of any of the provisions of the liquor tax law, shall be punished according to the provisions of this act."

Section 40 of the Liquor Tax Law provides that "Any person intoxicated in a public place is guilty of a misdemeanor, and may be arrested without warrant while so intoxicated, and shall be punished by * * * imprisonment not exceeding six months. * * *"

The act giving Courts of Special Sessions exclusive jurisdiction to try and determine complaints for violation of section 40 of the Liquor Tax Law makes no exceptions. It does not contain any reference to sections 56, 57 or 58 of the Code of Criminal

Procedure, so that the defendant cannot claim any privilege under the provisions of either of those sections, unless the language of the sections is broad enough to embrace a complaint for intoxication in a public place:

Section 56 of the Code of Criminal Procedure prescribes that "Subject to the power of removal provided for in this chapter, Courts of Special Sessions * * * have in the first instance exclusive jurisdiction to hear and determine charges of misdemeanors committed within their respective counties as follows:" naming thirty-seven crimes.

Section 58 provides: "When a person is brought before a magistrate charged with the commission of any of the crimes mentioned in section fifty-six * * * it shall be the duty of the magistrate to adjourn to give time for the defendant to apply for a certificate," and adds: "And when the defendant is brought before the magistrate, it shall be the duty of the magistrate to inform him of his rights under section fifty-seven and this section."

Section 57 provides for procuring a certificate that it is reasonable that the charge be prosecuted by indictment when the charge is any of the crimes specified in section 56.

It then becomes important to determine whether section 56 contains language sufficiently comprehensive to apply to a charge of intoxication in a public place.

Defendant's attorney calls attention to subdivision 35, and quotes the words: "Such other jurisdiction as is now conferred by statute," etc., and claims that the language is sufficient to embrace the charge made against the defendant.

The language quoted by the attorney is not now a part of subdivision 35. The subdivision was amended by chapter 555 of Laws of 1896, and now reads: "For all violations of the provisions of the agricultural, poor and domestic commerce laws," which manifestly does not apply to the charge in question.

My attention has not been called to any provision of law, and I have not been able to find any, which gives a justice of the Supreme Court or a county judge the power, when the charge against the defendant is intoxication in a public place, to order that the charge be prosecuted by indictment.

The Court of Special Sessions in my opinion had exclusive jurisdiction to try and determine the charge against the defendant.

I think the proceedings before the Court of Special Sessions were free from error.

Section 764 of the Criminal Code confers upon the court the power to modify the sentence imposed upon the defendant, if the court shall deem it in furtherance of justice to do so.

I am convinced that the justice imposed the sentence which seemed to him to be proper, and without doubt the effect upon the defendant of knowing that the law can lay a heavy hand upon those who violate its provisions will tend to impress him with the fact that it must be respected.

So far as I am advised the defendant while intoxicated did not commit any injury to person or property, and does not belong to the criminal classes. I think that, after the warning which he has had, a modification of the sentence to imprisonment in the Albany penitentiary for sixty days may have a good effect in restraining the defendant from a repetition of the offense.

An order may be prepared modifying the sentence to sixty days' imprisonment in the Albany penitentiary, and as modified affirming the judgment.

Judgment modified and as modified affirmed.

Court of Appeals. Reported. 157 N. Y. 681.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.* CONRAD STOCK, Respondent.

People *v.* Stock, 26 App. Div. 564. Affirmed. (Submitted, October 5, 1898; decided, October 25, 1898.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered April 14, 1898, affirming an order of Special Term discharging the respondent from custody under a writ of habeas corpus.

The respondent was convicted of a misdemeanor in having sold liquor without having obtained a liquor tax certificate, and sentenced to pay a fine of \$300, or in default thereof be confined

in the Dutchess county jail for a term not exceeding one day for each dollar of the fine.

N. N. Stranahan, for appellant.

Charles A. Hopkins, for respondent.

Order affirmed on opinions below.

All concur, except MARTIN and VANN, JJ., not voting.

First Appellate Department, October, 1898. Reported. 33 App. Div. 640.

In the Matter of the Petition of HENRY H. LYMAN for an Order Revoking and Cancelling Liquor Tax Certificate No. 4867, Issued to BELDEN CLUB.

APPEAL from an intermediate order, made in a special proceeding brought under section 28 of the Liquor Tax Law, to revoke a liquor tax certificate, which order overruled appellant's objection as to sufficiency of petition and denied his motion for a dismissal thereof.

Royal R. Scott, attorney for respondent, Lyman.

The order does not affect a substantial right within the meaning of sections 1356 and 1357 of the Civil Code, and, therefore, is not appealable.

In case a final order is made in the proceeding affecting a substantial right of the club, it may appeal from that order and in that appeal bring this order up for review. *Cambridge Valley Nat. Bank v. Lynch*, 76 N. Y. 514. The order overruled the objections with leave to answer, and the Belden Club having answered before appeal waived its right, if any, to appeal from the order.

If the final order revoked the certificate that would be the order affecting a substantial right and an appeal from it could bring up this preliminary order for review. Sec. 1316 Code of Civil Procedure. The objections are in nature of a demurrer and a

decision of the court sustaining or overruling a demurrer is an order and can only be reviewed on appeal from a final judgment entered thereon. Sections 1347, 1348 and 1349, Code of Civil Procedure. *Cambridge Valley Nat. Bank v. Lynch*, 76 N. Y. 514. *Wright v. Chapin*, 74 Hun, 521.

The objection to the petition on the part of the Belden Club, that in addition to locating the premises where it trafficked in liquors, the petition should, in each paragraph, have repeated it by saying that the illegal sales were made there, is a technical objection and the Belden Club does not claim to have been misled by it.

Alfred R. Page, attorney for respondent, Hilliard. (No points.)

Loftus & Caffrey, attorneys for appellant, Belden Club.

The petition is insufficient in that it fails to show that any of the alleged sales were made within the State of New York, or even that the Belden Club ever established itself at the premises mentioned in the petition.

Order affirmed, with ten dollars costs and disbursements. No opinion.

First Appellate Department, November, 1898. Reported. 34 App. Div. 389.

In the Matter of the Petition of HENRY H. LYMAN for an Order Revoking and Canceling Liquor Tax Certificate No. 2,524. Issued to JOHN FUHRMANN, at No. 223 East Twenty-second Street, New York.

JOHN FUHRMANN, Appellant; HENRY H. LYMAN, Respondent.

Liquor Tax—The exemption in favor of premises, within 200 feet of a schoolhouse, in which liquor was sold on March 23, 1896—it is waived where the traffic was thereafter suspended for eighteen months—What is not a continuance of the business.

The privilege conferred by subdivision 2 of section 24 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312), permitting the traffic in liquor on premises within 200 feet of a building used exclusively as a schoolhouse, provided such traffic was actually and

lawfully carried on in such premises on March 23, 1896, is forfeited, where it appears that, although such traffic was lawfully carried on in such premises on March 23, 1896, the license expired by operation of law June 30, 1896, and that no liquor tax certificate was granted for the traffic in liquors upon the said premises until December, 1897, the actual traffic in liquors upon the said premises being suspended between June 30, 1896, and January 1, 1898.

The mere fact that the fixtures used in the conduct of the business in this place were not removed, and that the person who had owned a chattel mortgage on such fixtures had foreclosed the mortgage and had been in possession of the premises during the period when no business was carried on, does not constitute a continuance of the business such as would prevent the surrender of the privilege to conduct the liquor business upon such premises; nor does the intention of the parties who held the lease, as to the future use of the premises, constitute a continuance of the business.

APPEAL by John Fuhrmann from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 20th day of August, 1898, canceling the liquor tax certificate issued to the said John Fuhrmann.

Moses Weinman, for the appellant.

Alfred R. Page, for the respondent.

INGRAHAM, J.: The only question involved upon this appeal is whether the premises upon which this defendant proposed to carry on the liquor business was within the provision contained in subdivision 2 of section 24 of the Liquor Tax Law (Chap. 112, Laws of 1896 as amended by chap. 312 of the Laws of 1897). The appellant applied for a liquor tax certificate, stating in his application that traffic in liquors was actually carried on in the premises named on March 23, 1896, and that said premises had been occupied continuously for such traffic since 1888. It appeared that in 1896 George Hahn received a license to traffic in liquors upon said premises, which license expired by operation of law June 30, 1896; that no liquor tax certificate was granted for the traffic in liquors upon the said premises until December, 1897, and that the actual traffic in liquors was suspended upon the said premises between the 30th of June, 1896, and January 1, 1898. No liquor tax certificate having been issued for the conduct of the liquor business upon such premises

during that period, the traffic in liquors thereupon was illegal. The premises in question were within 200 feet of a building used exclusively as a schoolhouse; and under section 24 of the Liquor Tax Law the traffic in liquors cannot be permitted in said premises unless such traffic was actually and lawfully carried on in said premises on the 23d of March, 1896. If on the 23d day of March, 1896, this place was lawfully occupied for such business, the appellant was entitled to a liquor tax certificate, unless such traffic in liquor were subsequently abandoned. Then such abandonment worked a forfeiture of the privilege conferred by the statute. That question was presented to this court in the fourth department in *People ex rel. Bagley v. Hamilton* (25 App. Div. 428). It was there held that where "the business of one proprietor is closed up and no resumption thereof attempted by his successor for sixty days, we think that, within the spirit of the law, the privilege which it grants must be regarded as surrendered." We think that case presents the correct construction of the act and that it is authority for the determination arrived at by the court below. The mere fact that the fixtures used in the conduct of the business of this place were not removed, and that the person who had owned a chattel mortgage on such fixtures had foreclosed the mortgage and had been in possession of the premises during the period when no business was carried on, was not a continuance of the business which would prevent the surrender of the privilege to conduct the liquor business upon such premises. The business thus was actually suspended for a period exceeding eighteen months. During that time no traffic of liquor could lawfully be carried on in those premises as no liquor tax had been paid under which such business could have been conducted. There was no claim that liquor was actually sold, or that any business was actually conducted on the premises during this period. The intention of the parties who held the lease as to the future use of the premises did not constitute a continuance of the business.

We think, therefore, that the order appealed from was right and should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ. concurred.

Order affirmed, with costs.

Supreme Court, Kings Special Term, November, 1898. Reported 25 Misc. 213.

Matter of the Application of WILLIAM BRIDGE for an Order Revoking and Cancelling the Certificate of License to Traffic in Liquors issued to GEORGE MOHRMANN.

1. Liquor Tax Law—Summary revocation of certificate for material false statement.

Where the petition of a citizen, and its supporting affidavits, conclusively show the falsity of a material statement made in an application for a liquor tax certificate, issued in August, 1898, relative to the prior procurement of the necessary consents of neighboring owners, and the circumstances indicate that the real facts were intentionally withheld in order to obtain the certificate, the latter will be revoked summarily, without the intervention of a referee to take testimony and report upon certain issues raised by an answer, interposed in the form of a pleading in an action.

2. Same—Exemption from consents lost by disuse of premises.

The exemption, from the necessity of procuring such consents, given to persons who were licensed to traffic in liquor when the Liquor Tax Law went into effect, is lost by the subsequent discontinuance of the business and the abandonment of the premises for such use.

PETITION by William Bridge, a citizen, for an order revoking and cancelling the liquor tax certificate, issued to George Mohrmann, by the deputy commissioner of the borough of Brooklyn, city of New York, on the ground that material statements in the application of the holder thereof were false, and that he was not entitled to receive and is not entitled to hold such certificate.

George W. Van Slyck, for petitioner.

John M. Ward, for respondent.

GARRETSON, J. The allegations of the petition are denied, in part, by answer interposed in form as a pleading in an action, and the respondent asks that a referee be appointed to take testimony and report the evidence to the court. The Liquor Tax Law, § 28, subd. 2, as amended by chap. 312, Laws of 1897. This course is not deemed necessary for the reason that there was served with the petition four affidavits which fully sustain the allegations of the petition, and no statement of fact therein

set forth is controverted by the affidavit of the respondent also submitted hereon.

This proceeding is instituted to have revoked and cancelled a liquor tax certificate issued on August 20, 1898, by the deputy commissioner of excise for the borough of Brooklyn in the city of New York, which authorized the respondent to conduct the business of trafficking in liquors to be drunk upon the premises at No. 20 Elm place in said borough, upon the ground that a material statement made in the respondent's application for the certificate is false, viz., that there were but three buildings occupied exclusively as dwellings, the nearest entrance to which is within two hundred feet, measured in a straight line, of the nearest entrance to the premises where the traffic in liquors was intended to be carried on. Id.

The proofs quite satisfactorily show that such statement was false when so made, and the circumstances tend to indicate that it was known so to be at the time, and that the facts were intentionally withheld, to obtain the certificate, which otherwise, the respondent could not have obtained.

The statement is material, for the commissioner is bound thereby, and has no discretion. *People ex rel Belden Club v. Hilliard*, 28 App. Div. 140.

In addition to three dwellings mentioned in the application for the certificate (as to two of which the respondent claims that he has secured valid consents), it is conclusively proven that there were at least seven other buildings occupied exclusively as dwellings, the nearest entrance to which, is within two hundred feet, measured in a straight line, of the nearest entrance to the premises No. 20 Elm place, as to which no mention is made in the application. It, therefore, appears that of the total number of ten dwellings, the respondent has consents as to two instead of seven, the required two-thirds. Even if the petitioner gave consent as to four of the seven, as claimed (which however is not established) the respondent has still failed to secure a sufficient number of consents. These four consents, if, in fact, given, were not made a part of the application, and they could not be made effective by filing them with the commissioner after the issuance of the certificate. Inasmuch as the commissioner is bound by the statement in the application, the applicant should also be. It was upon the representation of its truthfulness that the certificate was issued.

The further statement made in the application that the premises were occupied for such traffic from 1882 until March, 1897, is of no avail to the respondent. The exemption from the requirements of the statute as to consents is lost by a subsequent discontinuance of the business and the abandonment of the premises for such use. *Matter of Ritchie*, 18 Misc. Rep. 341; *People ex rel. Sweeney v. Lammerts*, id. 343; affirmed, 14 App. Div. 628.

The measurements were properly taken in a straight line, from point to point, as upon the radius of a circle of which the nearest entrance of the premises where the business was to be carried on, is the center, disregarding all obstructions in its course. The Liquor Tax Law, § 17, subd. 8, as amended by chap. 312, Laws 1897; *Matter of Ruland*, 21 Misc. Rep. 504. The prayer of the petitioner is granted.

Petition granted.

Supreme Court, Kings Special Term, November, 1898. Reported.
25 Misc. 217.

THE PEOPLE ex rel. ERNST OCHS, Relator, v. HENRY H. LYMAN,
as Commissioner, etc., Respondent.

Liquor Tax Law—A conviction does not cut off the right to a rebate for the tax of the ensuing year—Procedure to procure rebate.

The conviction, on April 26, 1898, of the holder of a liquor tax certificate of the offense of selling liquor on Sunday, does not affect the right of his assignee to recover the rebate of a tax paid, on April 25, 1898, by the same person for a new certificate, which would not become operative until May 1, 1898, and which was surrendered at the earliest opportunity, no business having been done under it.

Proper method of procuring the rebate discussed.

MOTION for a peremptory writ of mandamus to require the respondent to pay to the relator, as assignee of the liquor tax certificate, the full rebate of the tax paid by one Joseph Palevski therefor on April 25, 1898, and which authorized Palevski to traffic in liquors for the year commencing May 1, 1898.

The respondent opposed on the ground that it appeared from the motion papers that on April 26, 1898, Palevski was convicted of the offense of selling liquor on Sunday.

For further facts, see opinion.

Guggenheimer, Untermeyer & Marshall, for relator.

Mead & Stranahan, for respondent.

GARRETSON, J. I am of the opinion that the relator (a corporation) is entitled to the rebate of the tax paid for the liquor tax certificate issued to its assignor, Joseph Palevski, by the county treasurer of Queens county for the year from May 1, 1898, to May 1, 1899.

The conviction of Palevski was had on April 26, 1898, and while he was trafficking in liquors under a certificate issued for the year commencing May 1, 1897. The conviction worked a forfeiture of the certificate last mentioned, and deprived him of all rights and privileges thereunder and of any right to the rebate of the tax paid thereon. The Liquor Tax Law, § 34, subd. 2, as amended by chap. 312, Laws of 1897.

The certificate of 1898 was not in force at the date of the conviction. It did not become operative as a license until May 1, 1898. No business was carried on thereunder, and it was surrendered to the county treasurer on May 2d, the first day of the month being Sunday. Besides, the tax, although paid on April 25th, the date of its issuance, was not assessed until May 1st. *Id.*, § 12.

A careful reading of the law discloses no warrant for the contention of the respondent, that the right to the rebate under the certificate of 1898, is forfeited by the conviction of Palevski while the certificate of 1897 was in force. The conviction required the refusal of a certificate for the year from May 1, 1898, only, and such course would make necessary a return of the tax paid upon the appropriation therefor.

The penal provisions of the statute must be strictly construed and the courts will not bring about a forfeiture of property rights unless the language of the statute is clear and unequivocal. While the relator may not have peremptory writ of mandamus directing the respondent to pay the rebate to it, the general words of the notice of motion "for such other and further relief in the premises as may be just." might permit the issuance of the writ to require the respondent to prepare the two orders that the county treasurer pay the rebate in the manner mentioned in section 25, had a proper case been presented by the relator.

It does not appear from the petition that the county treasurer

has made the duplicate receipts required to be made by that section, and has transmitted one of them, with the tax certificate and petition for cancellation of the certificate, to the respondent. Indeed, the contrary is inferable from the statements of fact therein set forth.

The performance of these acts by the county treasurer is a prerequisite to the making by the respondent of the orders for such payment, and for that reason the motion must be denied.

Unless with the consent and at the instance of the respondent the county treasurer shall forthwith transmit such duplicate receipt and papers to the respondent, no relief can be afforded the petitioner in this proceeding, and it must have recourse in the first instance to its appropriate remedy against the county treasurer, to compel compliance with the statute on his part.

The motion for a peremptory writ of mandamus is denied, with \$30 costs.

Motion denied, with \$30 costs.

Supreme Court, Suffolk Special Term, November, 1898. Reported.
25 Misc. 361.

Matter of Application of JOHN SHERRY for a Revocation and Cancellation of the Liquor Tax Certificate of GEORGE VAN AUSDAL, JR.

Liquor Tax Law—A lessee of a dwelling cannot consent to liquor traffic.

Where, because of the proximity of buildings, used exclusively as dwellings, to a proposed saloon, the consents of their owners are necessary, under the Liquor Tax Law, to the conduct of traffic in liquors, such a consent can not lawfully be executed by the lessee of a dwelling; and the statement, in the application of a person for liquor tax certificate, that a certain consenting person was the lessee and agent of one of the buildings, when in fact he was only the lessee, is such a false representation of a material fact as justifies a revocation of the certificate.

PETITION by John Sherry, as a citizen, to revoke the liquor tax certificate granted by him as county treasurer of Suffolk county, upon the ground that there were two owners of dwellings within two hundred feet of the place for which certificate was applied

for. One owner executed consent, lessee and agent executed consent for other dwelling.

George C. Hendrickson, for petitioner.

William McKinney, for applicant.

WILMOT M. SMITH, J. This application is made for the revocation of the liquor tax certificate issued to George Van Ausdall, Jr., by the county treasurer of Suffolk county, on the ground that the application for said certificate contained a false representation as to the truth of a fact upon which depended the right of the applicant to receive said certificate. The application states that there are two buildings occupied exclusively as dwellings, the nearest entrance to which is within two hundred feet, measured in a straight line, of the nearest entrance where the traffic in liquors was to be conducted, and that the names of the owners of such buildings were Gustav Koerner and Edwin C. Dusenberry, lessee and agent, and the consents of these gentlemen that the applicant carry on the traffic, duly executed and acknowledged, are attached to and form a part of the application. The law provides that such consent may be executed by the owner or the duly authorized agent or agents of such owner of the buildings. It is undisputed that Mr. Dusenberry did not have the legal title of the building occupied by him, and was not the agent of the person holding the legal title, but was his lessee, and the contention of the applicant is that, having the exclusive right to the occupation of the premises for the time being, he was the owner of the same within the meaning of the law, and had a right to give the consent required by the Liquor Tax Law.

The owner of land is commonly understood to be the person who has the legal title thereto, and not one who, for the time being, has simply the right of possession. I think, if the Legislature had intended a meaning of the term "owner" different from the ordinarily accepted meaning thereof, apt words would have been used to denote the qualification of such meaning. Buildings are occupied in a great number, if not in a majority of cases, by lessees thereof having the exclusive right of possession for a fixed term. If it were intended that lessees could give the consents in question, I think the Legislature would have specifically so stated.

The law also provides that there shall be filed with the application for the certificate a consent in writing that such traffic shall be carried on, on the premises for which the certificate is applied, executed by the owner of the premises or by his duly authorized agent. In this case the consent was executed by Gustav Koerner, who held the legal title to the premises where the traffic in liquors was to be carried on. If the lessee could execute such consent, Mr. Van Ausdall, who was the lessee, would not require the consent of Mr. Koerner, the holder of the legal title. I think the word "owner" has the same meaning where the law refers to the owner on whose premises the traffic is to be carried on and the owner of the buildings within two hundred feet thereof, and that such owner is one who has the legal title thereto.

In certain cases, the person holding the legal title could subject his tenant without the tenant's consent to the annoyance of an adjacent saloon. On the other hand, the tenant, if he had such right, could subject the property of his landlord against his landlord's protest to the possible depreciation of his property by the presence of a saloon. I can see many reasons why the consent of both landlord and tenant should be required; but, as the law now stands, I find it to be the legislative intent to require the consent only of the holder of the legal title to the buildings affected. The application must be granted, but without costs.

Application granted, without costs.

Supreme Court, Kings Special Term, November, 1898. Unreported.

In the Matter of the Petition of HENRY H. LYMAN to Revoke a
Liquor Tax Certificate of the MALCOLM BREWING COMPANY.

A motion by State Commissioner Lyman to revoke and cancel a liquor tax certificate issued to the Malcolm Brewing Company was denied to-day by Justice Smith in Supreme Court, special term. The certificate authorized the defendant to traffic in liquors on the premises inside the ball grounds known as the Washington Park Base Ball Grounds, and the bar was to be situated on the north side of Third street, 350 feet east of Third

avenue. Not only was liquor sold here, but also three hundred feet away at the north end of the grand stand and separated by a gate and fence. Evidence was given that the brewing company sublet the privilege of selling liquors to one Henry Stevens.

Mead & Stranahan, for petitioner.

J. F. Bullwinkle, for respondent.

SMITH, J. S. C. I think that the violations of the provisions of the Liquor Tax Law which authorize the forfeiture of the certificate must be such a violation as would justify the criminal conviction of the holder of the tax certificate. The violation complained of was committed by one Stevens. Upon the undisputed evidence, I think Stevens was selling liquor by virtue of the certificate as agent of the Malcolm Brewing Company; but there is no evidence whatever that the sales complained of as a violation of the Liquor Tax Law were made with the consent or knowledge of the brewing company or by its authority. In the absence of such evidence, there could be no criminal conviction of the Malcolm Brewing Company for such violation.

Supreme Court, New York Special Term. Reported. N. Y. L. J.
December 24, 1898.

HENRY H. LYMAN *v.* YOUNG MEN'S COSMOPOLITAN CLUB and
FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

SAME *v.* TRUE FRIENDS SOCIAL AND LITERARY CIRCLE and FIDELITY
AND DEPOSIT COMPANY OF MARYLAND.

SAME *v.* UNITY LEAGUE and AMERICAN SURETY COMPANY.

LAWRENCE, J. While it is true that the only papers which can be used on a motion for a retaxation by the clerk are those which were before the clerk, as the plaintiff in obtaining the order to show cause herein used affidavits not before the clerk, to-wit, the joint affidavit of Messrs. Page and Sanford and the affidavit of Mr. Scott, each dated December 12, 1898, in which the ground on which the clerk adjusted the costs is stated, I think that the

defendants were entitled to read affidavits in reply. If this view, however, is erroneous there is enough before the court to show that the clerk's adjustment was correct, and the taxation in these cases should be affirmed on the merits, and the motion for a retaxation should be denied with \$10 costs to the defendants, in each case. (See *Comly v. The Mayor, etc.*, 1 Civil Pro. Rep. 317, per BARRETT, J.)

Settle the order on one day's notice.

County Court, Monroe County, December, 1898. Unreported.

PEOPLE OF THE STATE OF NEW YORK *v.* FERRANTO.

The indictment in this case charges the defendant with misdemeanor, committed by the sale of fermented and malt liquors on Sunday, December 6, 1896, at the city of Rochester. In the first count it is alleged that he did "offer and expose for sale fermented and malt liquors in quantities of less than five gallons at a time to be drunk on the premises, on the first day of the week commonly called Sunday, to divers ill-meaning and ill-disposed persons, said persons not being then and there guests of any hotel, contrary to the form of the statute, etc." The second count charges that the defendant on said day "did sell and deliver fermented and malt liquors * * * to a person, said person not being then and there a guest of any hotel." In the third count it is alleged that the defendant did "give away and deliver fermented and malt liquors * * * to divers ill-disposed and ill-meaning persons, said persons not being then and there guests of any hotel." The three counts refer to the same transaction.

The defendant demurs to the indictment, among other grounds because it does not contain a plain and concise statement of the act constituting the crime, as required by section 275 of the Code of Criminal Procedure.

Pomeroy P. Dickinson and Thomas E. White, for defendant.

George D. Forsyth, District Attorney, for the People.

SUTHERLAND, Co. J. It is claimed that this indictment is defective because it does not state the name of the purchaser to

whom the defendant is charged with selling liquor on the Sunday named herein, nor does it contain any allegation to the effect that the name of the purchaser was unknown to the grand jury. In an opinion written in 1837 by Chief Justice Nelson in *Peo. v. Adams*, 17 Wend. 475, the Supreme Court of this State said that in an indictment for selling liquor without a license it was not necessary to state the name of the purchaser. And this view was entertained by Chief Judge Hunt, of the Court of Appeals, in an opinion written in the case of *Osgood v. The People*, 39 N. Y. 449. But in the *Osgood* case it appears that the appeal to the Court of Appeals, upon the determination of which the opinion of Chief Judge Hunt was written, involved only the form of the judgment which was pronounced by the Court of Sessions and did not bring up for review the proceedings upon the trial. After *Osgood* was convicted in the Court of Sessions of Niagara county, a bill of exceptions was made, and, pursuant to the practice then followed, judgment upon the conviction was stayed until the decision of the Supreme Court should be had upon the exceptions; a writ of certiorari was then sued out and the proceedings upon the trial were reviewed and the conviction affirmed by the Supreme Court, which remitted the case to the Court of Sessions with directions to proceed and render judgment thereon. No appeal was taken by the defendant from the judgment of the Supreme Court affirming the conviction. The Court of Sessions, pursuant to the directions of the Supreme Court, rendered judgment upon the verdict and from the judgment thus rendered a writ of error was sued out from the Supreme Court which affirmed the judgment that the Court of Sessions had pronounced, and the appeal to the Court of Appeals was from the last mentioned judgment of the Supreme Court. On the second hearing of the matter the Supreme Court had held that the writ of error brought up for review only the form of the judgment, which was held to be regular. Judge Clerke of the Court of Appeals wrote an opinion in which he stated that the accused was not entitled to two reviews of the same trial by the Supreme Court, and that the Supreme Court upon the second hearing were right in confining their attention merely to the form of the judgment, and that the merits of the conviction were not properly before the Court of Appeals for review. In this opinion of Clerke, J., it appears all the rest of the judges of the Court of Appeals concurred. It would seem, therefore, that the statement made by

Chief Judge Hunt to the effect that upon a prosecution for an unlawful sale of liquor the name of the purchaser is not a material ingredient in the description of the act constituting the offense, had not the controlling force which it would have, had the court considered that the merits of the conviction were brought up for review.

The Code of Criminal Procedure, § 275, states that an indictment must contain "a plain and concise statement of the act constituting the crime." And under an indictment for selling impure milk the general term of the third department, in 1889 (*Peo. v. Burns*, 53 Hun, 275), held that this provision of the Criminal Code makes it necessary to state the name of the purchaser in such an indictment, or, if unknown, to allege such fact accordingly. The court says (at page 278): "The act sought to be charged was the sale of milk of a grade prohibited by said statute. To constitute such sale there must have been a purchaser, and the defendant was entitled to be informed by the indictment who such purchaser was, so that he could be prepared to disprove such sale upon the trial, if it had not been made as alleged. The omission of such statement in the indictment constituted a material defect, as, without it the defendant would be liable to surprise upon the trial and quite likely to be prejudiced by such omission. The defect, therefore, must be regarded as matter of substance, and not merely of form, as it was the right of the defendant to be informed not merely of the crime charged, but also of *the act* which constituted it." In *Peo. v. Stone*, 84 Hun, 130, the Supreme Court, General Term, fourth department, held that an indictment charging the defendant with offering for sale fertilizers below the grade required by statute, was fatally defective, among other reasons because it did not contain the name of the person to whom the fertilizer was offered to be sold nor any allegation that the name of such person was unknown to the grand jury. The court says (at page 137): "The doctrine of the cases cited seems to be conclusive upon this question, and to uphold the defendant's contention that the indictment was defective in not stating the name of the person or persons to whom the packages of fertilizer were offered for sale, or, if their names were not known, in alleging that fact." In *People v. Greig*, 59 Hun, 107, the defendant was the mayor of the city of Hudson and was indicted for engaging in the manufacture and sale of intoxicating liquors while holding such office, contrary, it seems, to the provi-

sion of the charter of said city. The indictment did not state the precise date of the alleged sale nor the name of the purchaser, and the General Term of the third department set aside the conviction, holding that the indictment was defective in that the exact nature of the charge was not therein set forth. And the court refer with approval to the language of Judge Ingalls in *People v. Burns, supra*, which has been quoted, to the effect that the name of the purchaser is a necessary ingredient in the description of the act constituting the offence. The grand jury of the county of Wayne indicted one Stark for libel. The indictment contained no averment as to the manner of publication, whether by writing, printing or posting, or otherwise than by mere speech, or of the person or persons to whom it was addressed or by whom it was seen or read, or that the names of such persons were unknown to the grand jurors. The judgment of conviction was reversed and the indictment was set aside, the General Term of the fifth department (*People v. Stark*, 59 Hun, 51) holding that the indictment was fatally defective for the want of a sufficient description of the act constituting the crime sought to be charged; and in the course of his opinion Mr. Justice Corlett by way of illustration, refers to prosecutions for the illegal sale of intoxicating liquors, and assumes that in indictments therefor it is essential to name the purchaser, or to state that the name is unknown to the grand jury, if such be the fact.

There is nothing in the statute nor in the character of the offense itself, which justifies the adoption of a form of pleading less liberal to a defendant when he is prosecuted for the illegal sale of liquor, than is required when he is prosecuted for the illegal sale of other commodities; and if the name of the purchaser is known, it should be stated in the indictment in order to identify the charge, lest the grand jury indict for one offense and the defendant be tried for another; to enable the defendant to prepare for his trial; and in order that his conviction or acquittal may inure to his protection should he again be indicted for the same act. And, in my opinion, an indictment for the unlawful sale of liquor which does not state the name of the purchaser, if he is known to the grand jury, fails to fulfill the office which it is intended to perform under our present system of criminal practice.

The demurrer of the indictment must be allowed, and sustained, and judgment may be entered accordingly.

Supreme Court, Onondaga Special Term, December, 1898. Reported.
25 Misc. 638.

Matter of the Petition of HENRY H. LYMAN, as State Commissioner of Excise, for an Order Revoking and Cancelling Liquor Tax Certificate No. 31,357, Issued to JACOB DIEFFENBACKER.

Liquor Tax Law—Illegal sale on a piazza which was possibly on State land.

Where a person authorized to traffic "in liquors in quantities less than five wine gallons, no part of which shall be drunk on the premises where sold or in any outbuilding, yard or booth or garden appertaining thereto or connected therewith," sells liquor in his building adjoining the towpath of the canal and permits the purchaser to drink it on a piazza fronting on the canal, and formed by the projection of the upper story of his building over the lower one, and which piazza was the usual approach to his store and bar, the statute is violated; and the fact, that the piazza may be on State lands and has been used by the State authorities as a place to deposit tools temporarily, is not a defense, where the State has taken no steps to remove the piazza.

PETITION for the revocation of a liquor tax certificate.

Mead & Stranahan, for petitioner.

E. La Grange Smith, for defendant.

HISCOCK, J. The following facts are undisputed: The defendant took out and at the time of the occurrences hereinafter mentioned held a liquor tax certificate which authorized him to traffic "in liquors in quantities less than five wine gallons, no part of which shall be drunk on the premises where sold or in any outbuilding, yard or booth or garden appertaining thereto or connected therewith." His premises consisted of a two and one-half-story frame building situate adjacent to the towpath of the canal. The upper story projected beyond the lower one, thus roofing and inclosing a piazza upon the front which adjoined and led to the lower one. In this lower one was defendant's store and place of business wherein he had a bar. This piazza was sometimes used by State authorities or others as a place of temporary deposit of tools or goods, but it was the usual if not only means of approach to defendant's place of business. Upon one or more of the occasions in question agents of the excise department stepped up to defendant's bar and asked for and

received glasses of whiskey, which they were told to, and did step out upon the piazza and drink, then returning to the bar and paying therefor. This course of business had, it is stated in defendant's brief, been commonly pursued by him for two years.

In addition to these facts it is claimed by defendant that this piazza was in whole or part upon State land, and by the petitioner that some of the liquor was drunk at the bar and not upon the piazza. I propose to consider the case upon the latter point, however, in the aspect most favorable to the defendant.

He urges that the piazza was not part of his premises and was not any "outbuilding, yard, booth or garden appertaining thereto or connected therewith." This contention, however, seems to call for altogether too narrow a construction of the statute. No reasoning can make it much plainer than the mere statement of the facts does, that this piazza was connected with, and used as, and was a part of defendant's premises. If it was upon the State land removal thereof could perhaps be enforced, but until that was done, and certainly as against everybody except the State, proceeding in a lawful manner it was within the possession of and under the control of defendant. The fact that by his license, and without compensation, others were occasionally permitted to use it was not sufficient to destroy this proprietorship.

The prayer of the petition is, therefore, granted, with costs.

Petition granted, with costs.

Court of Appeals. Reported. 157 N. Y. 368.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM H. D. SWEET, Appellant, v. HENRY H. LYMAN, State Commissioner of Excise, Respondent.

1. Civil service—Constitution and statute—Probationary appointment.

The adoption of the civil service clause of the Constitution of 1894 (Article 5, sec. 9) did not repeal or suspend the existing civil service statute and rules so as to render a probationary appointment improper or illegal as a test of merit and fitness.

2. Special agent in Excise Department—Confidential position—Veteran.

The position of special agent in the excise department, under the Liquor Tax Law (Laws of 1896, chap. 112, sec. 10), is in its nature a strictly

confidential position and therefore is not within the statutory provisions (Laws of 1896, chap. 821) promoting the appointment and retention of veterans in the civil service of the State.

3. Status of position not affected by civil service classification.

The actual and statutory status of the position of special agent in the excise department as a confidential position is not affected by the classification of the position as competitive, by the State Civil Service Commission.

People ex rel. Sweet v. Lyman, 30 App. Div. 135, affirmed.

(Argued October 4, 1898; decided December 6, 1898)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 24, 1898, affirming an order made at Special Term denying the relator's motion for a peremptory writ of mandamus commanding the respondent to reinstate him as special agent in the excise department.

The relator is a citizen of this State and an honorably discharged soldier of the Union army, who served in the late war of the rebellion. He passed a civil service examination for the position of special agent in the excise department, was notified thereof by the civil service board, and that his name was on the eligible list for appointment. Subsequently the State Commissioner of Excise wrote him as to his name being on the civil service list for appointment as special agent, and made inquiry in the letter as to his past, and afterwards had a personal interview with him. Afterwards, and on September 25, 1896, the commissioner appointed him for the probationary term of three months, and assigned him to certain duties, which he undertook to perform. On the nineteenth of the following December, and a few days before the expiration of the three months, the respondent wrote to the relator stating that his efficiency and capacity for the work during his probationary term of three months had not been found satisfactory, and that in accordance with the terms of his appointment and the civil service rules under which it was made, his term of service would cease on the twenty-third of December.

More than three months after the relator had left such employment, this proceeding was instituted. The petition for the writ alleged his citizenship; that he was an honorably discharged soldier; that he was examined by the civil service board, which certified that he was eligible for appointment; that he was

assigned to duty at Ogdensburg, N. Y.; that he properly rendered the services required in the position; that he received notice from the defendant stating his efficiency and capacity were not satisfactory; that no notice of any charges against him was ever given, and no such charges were made; that he was competent to fill the position, and that the defendant refused to reinstate him. Most of the allegations of the petition were admitted by the defendant's answer, except those relating to the competency of the relator to discharge the duties of the place. It then set up affirmatively that he was incompetent, inefficient, and performed certain improper acts during his service under such probationary appointment.

Upon the writ, petition and return the matter was brought to a hearing before a Special Term, when the relator asked for an alternative writ if the court held that any issue of fact arose upon the return. Upon the hearing the Special Term denied the relator's application for a peremptory writ, and did not award an alternative one. From that determination an appeal was taken to the Appellate Division, where the order of the Special Term was affirmed. That court held that the relator was not removed from the position of special agent within the meaning of the Veteran Acts; that he was properly appointed, but that his appointment was a probationary one for three months, and that as that period had expired, he was not removed from the position to which he was assigned, and, therefore, could not be reinstated under the provisions of chapter 821 of the Laws of 1896.

Eugene D. Flanigan for appellant. The defendant's powers in regard to the appointment and removal of veterans from office or employment under the Civil Service Law are purely of a ministerial nature. (*People ex rel. v. Common Council*, 78 N. Y. 33; *People ex rel. v. Comrs.*, 149 N. Y. 26; *Nuttall v. Simis*, 31 App. Div. 503; L. 1883, ch. 354; L. 1896, ch. 112; Cooley on Const. Lim. 52-54; *People ex rel. v. Rice* 135 N. Y. 473; *Ray v. Jeffersonville*, 90 Ind. 572; *Gridler v. Tally*, 77 Ala. 422; Const. art. 5, § 9; *Rogers v. Common Council of B.*, 123 N. Y. 175, 186; *Chittenden v. Wurster*, 152 N. Y. 345; *Matter of Keymer*, 148 N. Y. 219-226; *Baird v. Mayor, etc.*, 96 N. Y. 581; *Rathbone v. Wirth*, 150 N. Y. 468.) Relator was holding a position by appointment within the meaning of

chapter 821, Laws of 1896, and such position was not of a confidential nature. The classification of this position in the competitive list by the civil service board was proper. (*Chittenden v. Wurster*, 152 N. Y. 345, 381; *People ex rel. v. Tobey*, 153 N. Y. 381; *People ex rel. v. Wright*, 150 N. Y. 444, 449; L. 1883, ch. 354; *Matter of Keymer*, 148 N. Y. 219; *People ex rel. v. Roberts*, 148 N. Y. 360; 17 Am. & Eng. Ency. of Law, 248; *Wood v. City of Brooklyn*, 14 Barb. 425; *Cowen v. Vil. of West Troy*, 43 Barb. 48; *Clarke v. City of Rochester*, 28 N. Y. 605; *People ex rel. v. Adams*, 133 N. Y. 203, 207; *Arthur v. Moller*, 97 U. S. 368; First Annual Report U. S. Civil Service Comrs. 11; *People v. Poyllon*, 16 Abb. N. C. 119; *Rogers v. Common Council of B.*, 123 N. Y. 173; *People ex rel. v. Roberts*, 148 N. Y. 363; *Peck v. Belknap*, 130 N. Y. 394-399.) The relator having been appointed as the result of a competitive examination, is entitled to the protection afforded him by chapter 821 of the Laws of 1896, and cannot be removed from the position of special agent until after a hearing upon charges made and notice given, and the action of defendant in removing relator without such notice and hearing is illegal and void. (*Matter of Keymer*, 148 N. Y. 219; *People ex rel. v. Morton*, 148 N. Y. 156; *People ex rel. v. Bd. of Health*, 153 N. Y. 513, 520; *People ex rel. v. Thompson*, 94 N. Y. 451; *People ex rel. v. Fire Comrs.*, 72 N. Y. 445; *People ex rel. v. French*, 51 Hun, 347; *Chase v. Lord*, 77 N. Y. 18; *Matter of Livingston*, 121 N. Y. 104; *Curtin v. Barton*, 139 N. Y. 505; *Chittenden v. Wurster*, 152 N. Y. 345, 362; L. 1896, ch. 821.) Relator having been appointed to his position as the result of an open competitive examination, is entitled to retention in same until removed in the way and manner prescribed by chapter 821 of the Laws of 1896, and the summary action of defendant was illegal and void. (*Chittenden v. Wurster*, 152 N. Y. 345-357; *Matter of Sweeley*, 12 Misc. Rep. 174; 146 N. Y. 401; *Matter of Keymer*, 148 N. Y. 219, 226; Const. of 1894, art. 5, § 9; *People ex rel. v. Morton*, 148 N. Y. 156; *People ex rel. v. Bd. of Health*, 153 N. Y. 513, 519.) Relator waived no rights which he had. (*West v. Platt*, 127 Mass. 376; *Hammett v. Linneman*, 48 N. Y. 399; *Titus v. G. F. Ins. Co.*, 81 N. Y. 419; *Hamlin v. Sears*, 82 N. Y. 327; *Shapley v. Abbott*, 42 N. Y. 443; *Tibble v. Anderson*, 63 Ga. 41; *Payne v. Burnham*, 62 N. Y. 69.)

Theodore E. Hancock for respondent. The civil service laws, and rules and regulations established thereunder, provide for conditional or probationary appointments to the civil service of

this State. (L. 1883, ch. 354, § 2; *People ex rel. v. Cobb*, 13 App. Div. 59.) The relator's service was a probationary one and he was not permanently appointed. His appointment ceased because he was disqualified, and his conduct and capacity were not satisfactory. (Const. art. 5, § 9.) The relator was never removed from his position. He was never permanently appointed. (L. 1884, ch. 410; L. 1894, ch. 716; L. 1896, ch. 821.) The function performed by the State Commissioner of Excise, in determining that the appellant's "conduct and capacity" were not satisfactory, was a judicial determination, and involved the exercise of discretion, and such discretion cannot be reviewed by a writ of mandamus. (*People ex rel. v. Common Council*, 78 N. Y. 39; *Howland v. Eldredge*, 43 N. Y. 457; *People ex rel. v. Comrs.* 149 N. Y. 30; *People ex rel. v. Mayor, etc.*, 149 N. Y. 215; *In re Haebler v. N. Y. P. Ersch.*, 149 N. Y. 414; *People ex rel. v. Cromwell*, 102 N. Y. 477; *People ex rel. v. Brush*, 146 N. Y. 60.)

MARTIN, J. At the time of the relator's appointment chapter 354 of the Laws of 1883, as amended, provided for the appointment of commissioners who should constitute the New York civil service commission. It then made it the duty of such commission to aid the governor in preparing suitable rules for carrying the statute into effect; declared that such rules should provide for open, competitive examinations for testing the fitness of applicants for positions in the public service; that all the offices, places and employments should be arranged in classes, and that there should be a period of probation before any absolute appointment or employment. When the relator was appointed, one of the rules established by the civil service commission was as follows: "Every original appointment or employment in the civil service shall be for a probationary term of three months, at the end of which time, if the conduct and capacity of the person appointed or employed shall have been found satisfactory, the probationer shall be absolutely appointed or employed, but otherwise his appointment shall cease." It is manifest that the purpose of the statute and rule relating to probationary appointments was to enable the appointing officer to ascertain and correct any error or mistake of himself or of the civil service commission arising from the inefficiency of a candidate certified as eligible where he might prove incompetent to discharge the duties of the place to which he was appointed. It seems to be practically admitted that

if the statute of 1883 and the civil service rules established in pursuance of it were in force and valid when the relator's probationary term ended, the determination of the learned Appellate Division was right and should be affirmed unless the question is controlled by the Veterans' Act, which will be subsequently considered.

But it is contended that the provisions of the Constitution of 1894 relating to this subject have suspended or repealed the law and rules existing at the time, so that the defendant had no authority to make a probationary appointment. In other words, the appellant's claim is that, having been appointed by the respondent in pursuance of a certificate of his eligibility furnished by the civil service commission, his appointment could not be limited to any probationary term, and, therefore, he could not be removed except for cause shown after a notice and hearing.

Thus, the first point involved in this controversy is whether the amended Constitution repealed or suspended the existing statute and rules of the civil service commission so as to render a probationary appointment improper and illegal. Section 9 of article 5 of the Constitution provides: "Appointments and promotions in the civil service of the State, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late civil war, who are citizens and residents of this State, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section."

The effect of this provision upon the existing statute and rules of the civil service commission has been several times considered by this court. In *Pcople ex rel. McClelland v. Roberts* (148 N. Y. 360, 363) it held that chapter 354 of the Laws of 1883, as amended by chapter 681 of the Laws of 1894, constitutes a general system of statute law applicable to appointments and promotions in every department of the civil service of the State, with such exceptions only as are specified in the statute itself, and that by section 16 of article 1 of the Constitution of 1894, that act was continued in force as the law of the State, subject only to such

alterations as the Legislature might make. In delivering the opinion in that case Judge O'BRIEN said: "It is quite clear, also, that the civil service statutes constitute a general system of statute law applicable to appointments and promotions in every department of the civil service of the State, with such exceptions only as are specified in the statute itself." In *Chittenden v. Wurster* (152 N. Y. 345, 355) it was held that the statute of 1883 was in force, and provides the necessary machinery for carrying the provisions of the Constitution into effect, and the doctrine of the *McClelland* case in that respect was re-affirmed. In the *Sweeney Case* (12 Misc. Rep. 174, 181) Judge HERRICK discussed this provision of the Constitution. That case was affirmed by this court without opinion (146 N. Y. 401), and his opinion was especially commended by Judge BARTLETT in the *Keymer Case* (148 N. Y. 219, 224). In that case Judge HERRICK said: "The civil service law of the State, as it was prior to the adoption of the new Constitution, is, with the exception of the acts that have been passed relative to soldiers, in harmony with the Constitution." That principle was adopted by this court in affirming that case. Thus, we have its authority as declared in at least three of its decisions, establishing the proposition that the act of 1883, so far as it affects the question under consideration, is, and has been, in operation and effect since the adoption of the new Constitution, as well as before.

We think this proposition should be sustained upon principle, as well as upon the authority of our former decisions. The declaration of the Constitution is that appointments and promotions shall be made according to merit and fitness. The obvious purpose of this provision was to declare the principle upon which promotions and appointments in the public service should be made, to recognize in that instrument the principle of the existing statutes upon the subject, and to establish merit and fitness as the basis of such appointments and promotions in place of their being made upon partisan or political grounds. (Record Constitutional Convention, vol. 5, p. 2444; vol. 6, p. 2552, *et seq.*) It then declares that merit and fitness shall be ascertained by examinations, and also the extent to which they shall be thus determined. The extent to which examinations are to control is declared to be only so far as practicable. This language clearly implies that it is not entirely practicable to fully deter-

mine them in that way. It was the purpose of its framers to declare those two principles and leave their application to the direction of the Legislature. As was said by the chairman of the committee to which this amendment was referred: "It seemed best to the committee, after very careful and repeated consideration, to leave the application of the principle (of merit and fitness) to the good sense of the Legislature — the application of it." Thus it is apparent, not only upon the face of the provision itself, but from the debates in the constitutional convention, that the framers of this amendment did not intend to absolutely determine how the merit and fitness of appointees were to be ascertained and determined. The Constitution provides that to an extent those questions are to be determined by an examination, but it is obvious that it was understood at that time that it would be impracticable to fully determine the merit and fitness of an employee or appointee by a mere examination, whether competitive or otherwise. It is to be observed that the provision of the Constitution is that the merit and fitness of the applicant or appointee shall be ascertained in the manner stated *so far* as practicable, that is, in part at least, if they can be even partially ascertained in that manner. The words "so far as practicable" plainly relate to the degree or extent to which the examination should control. The provision is not that the examination shall be the basis of determining merit and fitness *when* or *where*, or in such cases as it is practicable, but that in all cases they are to be ascertained by an examination, only *so far* as practicable. In other words, it does not declare that the examination shall control in ascertaining merit and fitness in any or all cases where it is practicable, but that the qualifications of the candidate shall be ascertained in each case by an examination to the extent and only so far as it is practicable, and consequently sufficient to insure the selection of proper and competent employees. The Constitution plainly implies that other methods and tests are to be employed when necessary and calculated to fully ascertain the merit and fitness of the applicant. If a probationary term or other method is necessary to enable the appointing officer to fully or correctly ascertain the merit and fitness of the applicant, the plain and clear intent of this provision is that it shall be employed.

Assuming then that the framers of the Constitution contemplated that other methods might also be employed, surely

it can not be properly said that the trial of an applicant for a probationary period is not an appropriate method of testing and thus correctly ascertaining his merit and fitness. Besides, it is a reasonable method. Indeed it is the usual one. What good business man would employ an assistant, a clerk, or even a laborer for a period which he could not limit or control without adopting that method of ascertaining his qualifications for the place? There can be but one answer. Therefore, that the method provided by the statute and the rules of the civil service commission is appropriate and well calculated to materially aid an officer or department in determining the merit and fitness of an employee, can not be successfully denied.

Moreover, when this constitutional provision was adopted, and when it was proposed in the convention, the statute and civil service rules to which we have adverted were in force and were well known to and understood by the framers of that provision. Hence, it is but reasonable to suppose that when it was proposed they had the existing statute and rules in view, and did not intend to supersede or interfere with them. In the words of Judge O'BRIEN: "It is evident from the language of the new provision of the Constitution and from the debates in the convention which followed its introduction into that body, that it was framed and adopted with reference to existing laws, which were intended to give to it immediate practical operation. So that in adopting the new Constitution, the people, in their original capacity, decreed that, thereafter, all the departments of the government should be brought within the operation of existing laws on the subject of appointments." (148 N. Y. 369.)

While it is true that under the Constitution the merit and fitness of an applicant for appointment in the civil service of the State or its civil divisions are to be ascertained, in part at least, by an examination, competitive or otherwise, except in cases where such an examination would be wholly ineffectual to determine those questions, still, even in cases where an examination may be had, it is to control only so far as merit and fitness may be ascertained by a mere examination. As the Constitution plainly discloses that other methods were expected to be employed to insure proper appointments in the civil service of the State, doubtless it was the then existing method of probationary trial that was in the minds of its framers.

Again, when we examine the history of the reform in the civil

service, we find that the question of its propriety had arisen and been considerably discussed in this country for a considerable time before the year 1871. In the month of March in that year Congress passed the first civil service statute enacted in this country. That statute, however, was short and amounted to but little more than a mere declaration of the principle of civil service reform, with brief and what were regarded as insufficient provisions as to the means of carrying it into effect. It remained in that situation until 1883, when by reason of a continued agitation of the subject, the statute was extended and enlarged so as to include substantially all the provisions of the present law upon the subject. In that year the Legislature of the State of New York also passed the act under consideration which is, in all its essential particulars, like the act of Congress. That statute has been in full operation and effect in this State since that time, without amendment except in some minor particulars. Thus, although the act of 1883 was, to an extent, considered as tentative when passed, the experience of thirteen years under its provisions, both in relation to the State and Federal governments, had not, when the State Constitution was amended, seemed to its friends to require any radical or substantial change. Both the Federal and State statutes embodied the principle or method of probationary trials as a means of determining the merit and fitness of candidates. This method had also been employed in the civil service of Great Britain since 1855. The English civil service rules in existence then and since provide that no person shall receive a formal appointment in the civil service until his practical capacity and disposition have been tested by a probationary trial of six months, at the expiration of which, if not satisfactory, he is to be dropped. Practically the same provision is included in the Federal statute as well as in the statute of this State. It is also included in the civil service rules in the cities of Albany, Brooklyn, Poughkeepsie, Elmira, Rochester, Schenectady, Troy, Yonkers and other cities of the State. Indeed, I have been unable to find any commonwealth or political division where the principle of civil service reform is in force that does not include as a method of determining the qualifications of an appointee, the test of a probationary trial.

The propriety of this method is also particularly recognized by such civil service advocates as Dorman B. Eaton and Silas W.

Burt. The former, one of the earliest and most earnest advocates of civil service reform, in substance, says that the period of probation before actual appointment is necessary to exclude an applicant, if any should have passed the competition successfully who are found wanting in practical ability for the work. (Ency. Political Science, vol. 1, 485.) The latter, who for more than thirty-five years has been interested in the reform of the civil service, and under whose direction the first civil service examination in this country was had, in speaking of the subject of probationary trials, says: "This limitation (referring to the selection from the three persons standing highest) reduced the opportunities for favoritism to the lowest point deemed possible, since a restriction to the one person standing highest would annul the officer's discretion and responsibility for the appointment, while the three names gave a discretionary range that has by long trials been approved as sufficient, particularly since it was supplemented by appointment for a probationary period only before a permanent tenure was given. This probation was an essential part of the examination and has in practice shown how satisfactory the antecedent procedure was since the number of those who were dropped from service during or at the end of the probationary period has been so inconsiderable that it may be disregarded." (Report of 1897.) Thus we find not only that the civil service rules of Great Britain, the act of Congress, the statute of our own State, the civil service rules of the United States, of the State and of the cities thereof, provide for a probationary test, but the early and continuous friends and advocates of civil service reform also concur in regarding the probationary period as useful and necessary to the proper administration of the civil service. Therefore, when we consider the laws and civil service rules existing when the constitutional amendment was adopted, the position taken upon this subject by its friends and advocates, and the guarded language of limitation employed in the amendment, there would seem to be no doubt as to the purpose of the amendment, nor that it was intended to continue the hitherto uniform rule as to probationary trials.

This is made more clear when we remember that the individuals and organizations that were urging this amendment had previously induced the Legislature to adopt the statute of 1883 and the statutes amending it, and that they were also influential in

shaping the rules which were adopted by the civil service commission.

Obviously there are many positions in the civil service where the merit and fitness of an applicant cannot be ascertained with any certainty by a mere examination under the rules of the civil service. It seems apparent that what was intended by this provision of the Constitution was that merit and fitness should be the basis of appointments of public officers and employees, and that those qualities should be ascertained and determined, so far as they could be practicably, by such an examination, but that other and further methods should be employed when necessary to secure efficiency of service. It is manifest that actual trial of an appointee in the place which he seeks would furnish better means to accurately determine his fitness and merit than would any mere examination that could be had. Can it be said that the purpose of this provision was to prevent a probationary trial to discover the fitness and merit of an applicant, in view of the language employed, and of the extent to which probationary terms were then provided for? It is obvious that in many cases an applicant for a position in the civil service of the State, or of a municipality might be entirely qualified so far as his attainments disclosed by a civil service examination were concerned, and still be wholly unfit to occupy the position by reason of indolence, inadaptability to the service, garrulousness, want of character, experience, tact, integrity, or lack of a proper disposition, or the existence of habits which would render him quite unfit to assume the duties of the position and yet not be actually incompetent. This court has held that where the relations between the officer and the appointee are confidential this provision of the Constitution does not apply, but fails by reason of the impracticability of determining merit and fitness for such a position by a civil service examination. (*People ex rel. Crummey v. Palmer*, 152 N. Y. 217.) In *Chittenden v. Wurster* (152 N. Y. 345, 359), in discussing this question, Judge HAIGHT said: "A candidate may be ever so competent and still lack many of the necessary elements of a trustworthy officer; he may be ever so learned and still lacking in judgment and discretion; he may be discreet and still without character; he may be honest and yet meddlesome and a person in whom you could not confide."

If this provision of the Constitution is absolute, and permanent appointments must be made whenever the civil service board

certifies that an applicant is eligible, then, as the Constitution makes no exception as to confidential clerks or employees, no reason exists why it must not be enforced in those cases as well as in any other. It is true the statute in relation to veterans provides that it shall not apply to a private secretary, deputy of any official or department, or to any other person holding a strictly confidential position. That, however, is a mere declaration of the Legislature, and if the Constitution of 1894 relates to all appointments and positions in the civil service, and makes the examination by the civil service commission as to merit and fitness the measure which controls, then the Veterans' Act, so far as it relates to confidential appointees, is in conflict with that provision and is invalid.

The manifest purpose of the civil service statutes and of the amended Constitution was to improve the civil service of the State by securing employees of greater merit and fitness. Therefore, it is quite as much within their purpose and provisions that an examination should not control when other and better methods would secure an improved service, as that it should not apply to confidential positions. If it does not apply in one case, it applies only partially in the other. It can with no more propriety be said that an examination is impracticable because a position is confidential, than that it is at least partially impracticable because it will not fully ascertain the merit and fitness of the applicant. In one case the examination is impracticable by reason of the responsibility and confidential character of the position; in the other, by reason of the inefficiency of such an examination to fully and fairly determine the merit and fitness of the contemplated employee. One is impracticable because of the character of the position, and in the other the manner of ascertaining the qualifications of the applicant by examination is impracticable because insufficient. While we have held in regard to the former that those positions are not included in the provision as to examinations because they are not practicable to determine merit and fitness for such places, and, hence, no examination need be had, still, it is to be observed that the Constitution does not say that examinations shall not be made *when* impracticable, but that they shall be made *so far* as practicable to determine merit and fitness; that is, to the extent that they are practicable to accomplish that purpose, they shall be employed.

We think there are two classes of cases where the question

of practicability arises; one, where the place is such that no examination can be had because the questions of merit and fitness for the particular place can not be reached in that way, and the other where an examination may be had, but different and additional tests will tend to secure an improved service by more accurately determining these questions. If the statute providing a probationary term as one of the means to determine the merit and fitness of an appointee or employee is in conflict with the Constitution, then the statute which excepts from its operation deputies and confidential employees is also in conflict with it, and the former decision of this court as to persons holding a confidential relation to the person or department appointing them was not justified under the provisions of the Constitution. If the words "so far as practicable" do not apply to a case where the real merit and fitness of an appointee are sought to be determined by other methods which are surer and will more accurately determine those questions, then they have no meaning and cannot be employed to sustain the decision of this court in the *Chittenden* case..

As it is evident that the amendment of the Constitution was not intended to provide that civil service examinations should be the sole means of determining the merit and fitness of applicants, and as it expressly declared that laws should be made by the legislature to provide for its enforcement, and in view of the fact that this court has already decided that the statutes which were in existence when the Constitution was adopted are still in force, and are the laws of this State relating to the subject, we think it cannot be properly held that the statute which then provided for a probationary appointment as one of the means of ascertaining the merit and fitness of applicants, is in conflict with that provision of the Constitution.

But it is said that if this construction of the Constitution shall obtain, its provisions may be violated by unscrupulous and dishonest officers. That may be. There are few statutes or constitutional provisions that may not be thus violated. But in construing the language of the Constitution, distrust of public officers, or fear that they may not discharge their full duties, should not be assumed or entertained and made a basis for holding the statute of 1883 in conflict with it. In construing this amendment, this court should not assume that public officers will not perform their duty or will fail to discharge the respons-

ibilities imposed upon them by law in an honest and proper manner. "It must be assumed that the Legislature, and all other public bodies intrusted with the functions of government, general or local, will use the power conferred by the Constitution or the law fairly and in the public interests." (*Clark v. State*, 142 N. Y. 101, 105.) Nor is it to be assumed that the framers of the Constitution had any such idea in view when it was proposed and adopted. If it had been the purpose of the framers of this provision to prevent the Legislature from requiring other and existing means of determining the merit and fitness of appointees or employees in the public service, they would not have employed language limiting the extent and effect of such examination to practicability in ascertaining and determining them, but would have made the examination absolute and controlling. So, too, if they had intended to limit the matter of practicability to particular positions or places, they would have employed language expressing that idea, such as "in such cases as it is practicable," or some other equally apt term. Instead of employing any such expression, they have used one which shows plainly that the limitation of practicability was intended to be one of extent, and applicable to all cases alike.

By these considerations we are led to the conclusion that the law of 1883, providing for a probationary term in which to test the merit and fitness of an applicant for a position in the civil service of the State or the various municipalities thereof, is not in conflict with the provisions of section 9 of article 5 of the Constitution. Therefore, that statute being valid and in force at the time of the relator's appointment, it is obvious that his services for the State were properly terminated so far as the civil service laws and regulations are involved.

This brings us to the consideration of the question whether the rights of the relator are controlled by the Veterans' Act (Ch. 821, L. 1896). It is contended that, independently of the Civil Service Law and by virtue of that act, a veteran has an absolute right to be preferred and appointed to any appointive position he seeks, unless the officer or department having the power of appointment shall show affirmatively, upon a hearing after notice upon charges made, that he is incompetent, or has been guilty of some act or misconduct which renders him unfit for the place, and the burden of proof is upon the officer or department to establish such incompetency or misconduct.

The Veterans' Act, however, declares that its provisions shall not be construed so as to apply to any person holding a confidential position. So that if the position of special agent was confidential, then chapter 821 has no application in this case, although it may have force in others. Section 10 of the Liquor Tax Law (Ch. 112, L. 1896) permits the State Commissioner of Excise to appoint not more than sixty special agents at an annual salary of twelve hundred dollars, payable monthly, and then declares: "Such special agents shall be deemed the confidential agents of the State commissioner, and shall, under the direction of the commissioner and as required by him, investigate all matters relating to the collection of liquor taxes and penalties under this act, and in relation to the compliance with law by persons engaged in the traffic in liquors." Then follows a detailed statement of the duties of such special agents, which shows quite clearly that they are of an important and confidential character. The position of such an agent is one in which he represents the commissioner in a manner and to an extent which may well be regarded as strictly confidential. Thus we find that the same Legislature, which excepted from the operation of the Veterans' Act any person holding a strictly confidential position, declared the position held by the relator to be confidential.

That the position of special agent is confidential there can be little doubt. This court has had occasion recently to several times consider the question as to what constitutes a confidential position. In *Matter of Ostrander* (12 Misc. Rep. 476) it was held that the position of deputy superintendent of public buildings was a confidential one, and, therefore, fell within the exception to the Veterans' Act, which gave preference in appointment to honorably discharged soldiers, sailors and marines. That case was affirmed by this court on the opinion of the court below. (146 N. Y. 404.)

In *People ex rel. Crummey v. Palmer* (152 N. Y. 217, 220) this court again considered the meaning of the word "confidential," as used in a similar statute, and it was there said: "The statute which we have under consideration has reference to officials, and the confidential relations mentioned undoubtedly have reference to official acts, and include not only those that are secret, but those that involve trust and confidence which are personal to the appointing officer. If, therefore, the statute casts upon an officer a duty involving skill or integrity, and a liability

either personal or on the part of the municipality which he represents, and he intrusts the discharge of this duty to another, their relations become confidential." It was there held that an assistant warrant clerk in the office of the comptroller of the city of Brooklyn sustained a confidential relation to his superior officer within the meaning of a statute preventing the removal of soldiers, sailors or members of a volunteer fire department in any city of the State.

In *Chittenden v. Wurster* (Id. 360) this question was also considered, and, after referring to the *Crummey* case, it was there said: "We then were of the opinion that where the duties of the position were not merely clerical, and were such as were especially devolved upon the head of the office, which, by reason of his numerous duties, he was compelled to delegate to others, the performance of which required skill, judgment, trust and confidence and involved the responsibility of the officer or the municipality which he represents, the position should be treated as confidential."

When we read the provisions of section 10 of the Liquor Tax Law, which declare that a special agent shall be deemed the confidential agent of the State commissioner, and ascertain the duties he is required to discharge under the immediate direction of the commissioner, it becomes manifest that they are of a confidential character. His acts are official acts performed for and in the name of the commissioner, and are not only secret, but they also involve trust and confidence which are personal to the appointing officer. The duties cast upon the special agent involve skill, integrity and liability personal to the officer he represents, and the relations between the excise commissioner and the special agent fall plainly within the principle of the previous decisions of this court upon the subject. Thus the position to which the relator was appointed was not only declared by statute to be confidential, but its duties were such as to render it clearly so under the doctrine of the cases decided by this court.

It is, however, said that the civil service commission has placed the position of special agent in the list where competitive examinations are required, and, hence, the position cannot be regarded as confidential. Surely the civil service commission cannot change the actual status of a position by declaring one which is actually confidential not to be so, nor is it vested with power

to repeal a valid statute or to practically annul it by declaring a position to be competitive when the law has provided otherwise, and the position is plainly of a strictly confidential character.

I find no significance in the suggestion that the question of the confidential character of the position of special agent was not raised by the excise commissioner in the courts below. If that were admitted, it would not aid the relator, as it is a universal rule that it is the duty of the appellate court to affirm a judgment which is correct, although the ground assigned for the decision may be untenable. In other words, the rule requires that a correct judgment should be affirmed, regardless of the correctness of the reasons given for awarding it. If the act of 1883 is valid and still in force, and the position of special agent is a confidential one, it follows that the judgment was right and should be affirmed.

We are of the opinion that the statute of 1883 and the statutes amendatory thereof are still in force and are not in conflict with the Constitution; that the position of special agent was a confidential one; that the relator was not entitled to be appointed to or retained in the position of special agent, and that the Appellate Division properly so held.

The order should be affirmed, with costs.

HAIGHT, J. (dissenting). William H. D. Sweet, the appellant, is a citizen of this State and is an honorably discharged soldier of the Union army during the late civil war, having served therein as a second lieutenant of the Third regiment of cavalry of New York State volunteers.

In June, 1896, he passed the civil service examination and was placed upon the register of applicants eligible for appointment to the position of special agent under the Liquor Tax Law. On the 26th day of September thereafter, the defendant appointed him to the position of special agent for a probationary term of three months, upon a salary of \$1,200 per annum. He thereupon entered upon the discharge of the duties of his position and served the term for which he was appointed. On the 19th day of December, 1896, he received a letter from the defendant notifying him that his efficiency and capacity for the work required as a special agent during his probationary term of three months had not proved satisfactory, and that his employment would cease on the

23 day of December thereafter. On the 8th day of April, 1897, he petitioned the court for a peremptory writ of mandamus directed to the defendant commanding him to reinstate him to the position of special agent, or for such other and further relief as may be just and proper. In his petition he alleged that he had the capacity required for the performance of the duties of a special agent, and that he was efficient in the discharge of his duties as such during his probationary term. The defendant opposed his application for the writ upon an affidavit filed by him asserting his inefficiency and incapacity for the discharge of the duty of the position. Upon the hearing of the motion before the court, the relator asked that an alternative writ issue in order that the question of his capacity and efficiency might be determined by the court. The court refused to issue an alternative writ and denied his motion for a mandamus, and this order was affirmed in the Appellate Division.

Chapter 821 of the Laws of 1896 provides that: " § 1. In every public department and upon all public works of the State of New York * * * honorably discharged Union soldiers, sailors and marines shall be preferred for appointment, employment and promotion; * * * provided they possess the business capacity necessary to discharge the duties of the position involved. And no person holding a position by appointment or employment in the State of New York * * * who is an honorably discharged soldier, sailor or marine, * * * shall be removed from such position or employment except for incompetency or misconduct shown, after a hearing upon due notice, upon the charge made, and with the right to such employee or appointee to a review by writ of certiorari; a refusal to allow the preference provided for in this act to any honorably discharged Union soldier, sailor or marine, or a reduction of his compensation intended to bring about a resignation, shall be deemed a misdemeanor, and such honorably discharged soldier, sailor or marine shall have a right of action therefor in any court of competent jurisdiction for damages, and also a remedy by mandamus for righting the wrong. The burden of proving incompetency or misconduct shall be upon the party alleging the same. But the provisions of this act shall not be construed to apply to the position of private secretary or deputy of an official or department or to any other person holding a strictly confidential position."

It may be that the provisions of this act casting the burden of proving incompetency upon an officer charged with the duty of making appointments to the civil service is unwise, and that the clause making him guilty of a misdemeanor, and liable personally in damages in case he fails to allow the preference provided for, is harsh and unreasonable. Possibly these provisions may operate to deter officers from exercising their judgment against applicants in considering their business capacity, and that, in consequence, incompetent persons may receive appointments to positions in the civil service, thereby prejudicing the public interests; but as to the wisdom and effect of these provisions we have nothing to do, and if they are unwise, harsh and unreasonable the remedy is with the Legislature. As long as they remain a part of our statutes it is the duty of the courts to faithfully execute them.

The statute, as we understand it, as applied to the case under consideration, casts the burden of showing that the relator did not possess the business capacity necessary to discharge the duties of special agent upon the defendant. He appointed the relator for the probationary term of three months, provided by the statute and the rules promulgated by the governor. The commissioner thus had an opportunity to ascertain his competency and business capacity. At the end of the probationary term the relator, being an honorably discharged Union soldier, was entitled to his permanent appointment, provided he possessed the business capacity necessary to properly discharge the duties of the position. The commissioner, in the first instance, was charged with the duty of determining that question of fact. He found against the relator, but his finding is not conclusive. Under the provisions of the act the relator is given the right to have the correctness of the commissioner's determination ascertained by mandamus. This remedy he invoked, and it appears to us that, upon the papers presented, he was entitled to an alternative writ, to the end that the question raised with reference to his competency and business capacity might be tried and determined by the court in the usual way.

It is now contended that the provisions of the Liquor Tax Law (Chap. 112, sec. 10, Laws of 1896) provide that the special agents "shall be deemed the confidential agents of the State commissioner," and that the provisions of the act which we have above considered do not apply to any "person holding a strictly confidential position." It will be observed that in the Liquor Tax Law the word "strictly" is omitted, but assuming that it

was the intention of the Legislature to make the position of special agents a strictly confidential position, the question then arises as to whether it is in conflict with the civil service clause of the Constitution, which provides that "appointments and promotions in the civil service of the State * * * shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive." In considering these provisions of the Constitution in the case of *Chittenden v. Wurster* (152 N. Y. 345), we held that competitive examinations were not practicable for positions which were strictly confidential to the appointing officer, and in that case and in the *Crummey Case* (152 N. Y. 217) we discussed to some extent the question as to what constituted a confidential position. Of course, great weight should be given to the determination of the Legislature as to the character of the position. It, however, cannot override the Constitution and by an enactment make a position confidential which, under a fair and reasonable construction of the Constitution, is not confidential. Whether a position is confidential or not depends largely upon the character of the duties of the position. We think, however, that we are relieved from the consideration of this question at this time for the reason that the commissioner of excise in this case has made no claim that the position was confidential or that he refused to appoint the relator for that reason. In his answer to the petition for the writ of mandamus he alleged two grounds, and two only for the opposing of the allowance of the writ. These grounds were, first, incompetency, and second, *laches* in instituting the proceedings. Those were the only questions brought to the attention of the court and are the only questions which we think can properly be here considered.

The order of the Appellate Division and that of the Special Term should be reversed and an alternative writ issued, and for that purpose the proceeding should be remitted to the Special Term, with costs to abide the final award of costs.

PARTLETT, J. (dissenting). I agree with Judge HAIGHT for reversal but place my vote on the grounds stated in his opinion and the additional ground based on the civil service provisions of the Constitution (Art. V, § 9).

The fundamental law commands that appointments and promotions in the civil service shall be made according to merit and

fitness, to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive. It then further commands that the honorably discharged soldiers and sailors in the late civil war, who are citizens and residents of this State, shall be entitled to preference in appointment and promotion without regard to their standing on any list from which such appointment or promotion may be made.

In my opinion, when the name of a veteran is duly reached on the eligible list, he is entitled, under the provisions of the Constitution and the law enacted to carry them out, to an absolute appointment, and thereafter can be removed only for incompetency or misconduct. (Ch. 821, Laws 1896.)

The provisions for a probationary appointment of three months (Laws 1883, ch. 354, § 2, and rule 12 of the Civil Service Board) are contrary to the letter and spirit of the Constitution, and consequently void. The rule enacted by legislative authority, and as amended in 1896, provides: "At the end of such term, if the conduct, capacity and fitness of the probationer are satisfactory to the appointing officer, his retention in the service shall be equivalent to his absolute appointment; but if his conduct, capacity and fitness be not satisfactory, he may be discharged at any time."

If this rule and the legislation upon which it is based can stand, it may be well asked what has become of that protection which the Constitution is supposed to afford the veteran after his merit and fitness have been ascertained by a competitive examination and his name entered on the eligible list?

It comes to this, that he receives his absolute appointment only if his conduct, capacity and fitness are satisfactory to the appointing officer. To my mind, this amounts to a practical repeal of the constitutional provisions to which reference has been made.

If the act of 1883 and the rule framed in pursuance of it stand, the Legislature can repeal the act of 1896 and all other acts standing in the way, and appointments will depend upon the whim, the caprice, of an appointing officer if he is disposed to abuse the power with which he is vested.

It is no answer to say that the law presumes an officer will perform his duty properly.

The civil service policy of the State, which was finally placed in the Constitution, seeks to do away with this abuse of power and patronage.

I am not content to rest my vote solely on the act of 1896.

MARTIN, J., reads for affirmance. PARKER, Ch. J., GRAY and VANN, JJ., concur. HAIGHT, J., concurs so far as it relates to the civil service provisions of the Constitution and statutes, but dissents as to the portion relating to the Veterans' Act upon the grounds specified in his opinion.

HAIGHT and BARTLETT, JJ., read for reversal, and O'BRIEN, J., concurs.

Order affirmed, with costs.

Fourth Appellate Department, December, 1898. Reported. 35 App. Div. 227.

HENRY H. LYMAN, as State Commissioner of Excise, Respondent,
v. FRANK MATTY, Appellant.

Intoxicating liquor—Place of trial of actions brought under section 42 of the Liquor Tax Law.

In an action brought under section 42 of the Liquor Tax Law (Chap. 112, Laws of 1896, as amended by chap. 312, Laws of 1897), the defendant, when the venue is laid in a county adjoining that of his residence, can not move to have the place of trial changed to the county in which he resides; if the action is not brought in a county adjoining the county of his residence, he may move to have the place of trial changed to some one of the adjoining counties, but not to his own county.

APPEAL by the defendant, Frank Matty, from an order of the Supreme Court, made at the Oswego Special Term and entered in the office of the clerk of the county of Oswego on the 10th day of January, 1898, denying his motion to change the place of trial of the action from Oswego county to Onondaga county.

John W. Hogan, for the appellant.

S. B. Mead, for the respondent.

FOLLETT, J.: *Lyman v. Gramercy Club* (28 App. Div. 30) is not in point. That action was brought against sureties to recover for the breach of a bond given and prosecuted pursuant to section 18 of the Liquor Tax Law, and the only reference in the act to

the venue or to the place of trial of such actions is contained in that section, which provides that such an action may be brought "in any court of record in any county of the State." The case cited simply holds that this language did not deprive the court of power to change the place of trial given by the Code of Civil Procedure.

The action now before the court is brought for the recovery of penalties under the 42d section of the Liquor Tax Law which provides that such an action may be brought "in any court of record in any county of the State." If there were no other provision in respect to place of trial, *Lyman v. Gramercy Club* would be an authority, but the 42d section contains this further provision: "When an action is brought in any county other than the county wherein the defendant resides, or in an adjoining county, the place of trial of such action may be changed to any county adjoining the county wherein the defendant resides, for cause shown as provided by the Code of Civil Procedure." This provision denies the defendant the right in such an action, when the venue is laid in an adjoining county, to move to have the place of trial changed to the county in which he resides, but he may, in case an action is not brought in a county adjoining the county of his residence, move to have the place of trial changed to some one of the adjoining counties, but not to his own county.

I think the order is right, and that it should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

Third Appellate Department, December, 1898. Reported. 35 App. Div. 624.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* GEORGE W. SMITH, Appellant.

Judgment modified by striking out that portion thereof which directs that the defendant stand committed to the common jail of the county until such fine is paid, and as so modified affirmed on authority of *People v. Stock*, (26 App. Div. 564; *affd.*, 157 N. Y. 681). No opinion. All concurred.

Fourth Appellate Department, December, 1898. Reported. 35 App. Div. 632.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* THOMAS CRITELLI, Appellant.

APPEAL from judgment entered upon verdict of jury finding defendant guilty of selling or giving away liquor on Sunday.

Charles D. Newton, attorney for appellant.

The court erred in charging the jury that if they found that defendant gave away lager beer on Sunday to the special agents on the occasion in question, or to anybody else in their presence, then he was guilty, as charged in indictment.

The court erred in charging the jury that if defendant gave away lager beer on Sunday, it made no difference whether it was his or belonged to some of his guests who had bought a case and who had authorized this particular gift.

Charles H. Rowe, attorney for respondent.

The defendant was selling or giving away liquors on Sunday. That such liquor had been purchased in quantity by his boarders the night before, so as to have it on hand for Sunday, was not material if he gave any of it away, either with the consent of the owners or otherwise, and the charge to that effect was no error.

Judgment modified by striking therefrom the words "or stand committed to the Livingston county jail until paid, not exceeding two hundred days," and, as modified, affirmed. (See *People v. Stock*, 26 App Div. 564; *affd.* 157 N. Y. 681).

All concurred, WARD, J., not voting.

Supreme Court, Monroe Special Term, January, 1899. Unreported.

HENRY H. LYMAN v. LENA ZIMBRICH and FIDELITY & DEPOSIT Co.,
of Maryland.

DUNWELL, J.: Motion by defendant, Fidelity and Deposit Company of Maryland, to require plaintiff to separately state and number the causes of action, to make the complaint more definite and certain, to strike out portions thereof, or for a bill of particulars. The action is upon a bond and seeks to recover the single penalty provided therein, consequently, but one cause of action is stated, and that part of this motion requiring plaintiff to state separate causes of action must be denied.

That part of the motion seeking to strike out the fifth paragraph of the complaint, the words "pretending to carry on such traffic under and by virtue of such certificate" is denied; and that part of said motion seeking to make said fifth paragraph more definite and certain, or that defendant be furnished with a bill of particulars of same is denied.

That part of the motion to strike out as irrelevant and redundant, the sixth paragraph of the complaint, or to make it more definite and certain, is denied; and that part of the motion to strike out the words "in violation of the conditions and covenants of said bond," in the second and third lines of the sixth paragraph is granted; and that part of said motion to strike out the words in the last four lines of the sixth paragraph, "and that suffering and permitting said premises to so become, be and remain disorderly, was a violation of said Liquor Tax Law, and a breach of the conditions and covenants in said bond contained," is granted.

That part of the motion for a bill of particulars, in respect to allegations of the sixth paragraph is granted, so far as to require plaintiff to set forth, so far as is within his knowledge and information, in substance, the respects in which the premises of defendant Zimbrich were disorderly, and the times and occasions thereof, in respect to which plaintiff expects to give evidence.

That part of the said motion to strike out the words in the second and third lines of the seventh paragraph "in violation of the conditions and covenants of said bond" and the words in the fourth, fifth, sixth, seventh, eighth and ninth lines of said paragraph "in violation and contrary to the provisions of sub-

division 9, section 23 of said Liquor Tax Law, by carrying on and permitting to be carried on, and being interested in a traffic and business, the carrying on of which is a violation of law"; and the words in the last three lines of said seventh paragraph, "All of which is in violation of said section 23, subdivision 9, of said Liquor Tax Law, and a breach of the conditions and covenants in said bond contained," is granted. That part of the motion to make the seventh paragraph of said complaint more definite and certain, and for a bill of particulars in respect to the allegations of the seventh paragraph is denied.

That part of the motion relating to the eighth paragraph of said complaint, requesting that it be made more definite and certain, or for a bill of particulars, is denied.

That part of said motion to strike out as irrelevant and redundant, the ninth paragraph of said complaint, is denied.

The order to be entered upon this decision may provide that plaintiff may serve an amended complaint herein within ten days from the entry of the order, in accordance with the changes provided by said order.

The answer already served to stand as an answer to the amended complaint, or defendant, at its option, to have ten days within which to serve an answer to the amended complaint. The bill of particulars granted by the decision to be served within twenty days from the entry of the order.

The order herein provided for is without costs to either party upon this motion.

Supreme Court, Appellate Term, January, 1899. Reported. 25 Misc. 735.

ROSE WILKING, Respondent, *v.* ADOLPH RICHTER, Appellant.

Services—Illegal contract that a woman shall serve liquors—Illegality shown under a general denial alone.

A contract that a woman, not a member of her employer's family, should serve wines and liquors to customers on the premises is illegal under the Liquor Tax Law as amended (Laws of 1897, chap. 312, sec. 31, subd. f); and the defense of illegality, although not pleaded specifically, may be raised under a general denial.

APPEAL from a judgment of the Fourth Municipal Court, borough of Manhattan, in favor of the plaintiff.

C. Brandt, Jr., for appellant.

L. W. Harburger, for respondent.

GILDERSLEEVE, J. On or about June 27, 1898, the defendant entered into a verbal contract of employment with plaintiff, by the terms of which he was to pay her \$2 a day for her services as a waitress in Glendale Park, during the National Schutzen Fest, from July 3d to July 11th, inclusive. It was understood that the duty of the plaintiff was to serve wines and liquors to the customers. On July 2d, plaintiff received word from defendant not to go to Glendale, as the police objected to women serving as waitresses there. The plaintiff, however, offered her services, in accordance with the contract, but defendant refused to give her any work. She tried to get work elsewhere and failed to obtain it. She brought this action to recover for the breach of contract.

The pleadings are oral. The complaint is for "breach of contract, and work, labor and services." The answer is a "general denial." It was admitted that plaintiff performed no work under the contract. The defendant moved, at the end of the case, to dismiss the complaint, on the ground that the contract was unlawful at its inception. The motion was denied on the ground that this defense should have been specially pleaded. Judgment was then given for the plaintiff.

That the contract was unlawful is clear. The statute (Laws of 1897, chap. 312, § 31, subd. f), declares that "It shall not be lawful for any corporation, association, copartnership or person, whether having paid such tax or not, to permit any girl or woman, not a member of his family, * * * to sell or serve any liquor upon the premises." It is not pretended that plaintiff was a member of defendant's family.

As to the question of the sufficiency of the general denial, we may say that the general rule is that a general denial in the answer, in an action on a contract, puts in issue simply all matters which plaintiff is bound to prove to make out his cause of action; and, in order to avail himself of facts, not appearing upon the face of the contract, to establish its invalidity, the defendant must plead them. See *Milbank v. Jones*, 127 N. Y. 370. But, under a general denial in an action on contract, defendant may object that the plaintiff's evidence shows that no valid contract was made. See *Cary v. Western Union Tel. Co.*, 20 Abb.

N. C. 333, Van Brunt, P. J. The theory, upon which the action proceeds, is that the plaintiff has a contract valid in law, and whatever shows the invalidity of the contract shows that no such contract as alleged ever existed. See *Oscanyan v. Arms Co.*, 103 U. S. 266. In the case at bar, the contract was verbal. Plaintiff, however, on her cross-examination, testified thus: "Q. This particular place was a public park, where you were to serve wine? A. Yes, sir. Q. If you were called upon to bring a bottle of wine to a customer, you would do it? You were told it was for that purpose? A. Yes, sir." It appears, therefore, from plaintiff's own version of the contract, that it called upon her to serve wines and liquors. The general denial was sufficient, and this defense of illegality was available, although not pleaded specifically.

The contract, being unlawful, cannot be enforced, and plaintiff is not entitled to recover damages for its breach.

Judgment must be reversed and a new trial ordered, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

Second Appellate Department, January, 1899. Reported. 36 App. Div. 533.

In the Matter of the Application of WILLIAM BRIDGE, Respondent, for an Order Revoking and Cancelling the Certificate of License for Trafficking in Liquors issued to GEORGE MOHRMANN, Appellant.

H. W. Michell, Special Deputy Commissioner of Excise for Kings county, respondent.

APPEAL by George Mohrmann from an order of the Supreme Court, made at the Kings county Special Term and entered in the office of the clerk of the county of Kings on the 14th day of November, 1898, revoking and cancelling the liquor tax certifi-

cate issued to him by the special deputy commissioner of excise for Kings county.

Order affirmed, with ten dollars costs and disbursements, on the opinion of GARRETSON, J., at Special Term.

All concurred.

Second Appellate Department, January, 1899. Reported. 36 App. Div. 638.

ABRAHAM GOTTSCHALK, Appellant, *v.* ELIZABETH SCHOCK, Respondent, Impleaded with JACOB SCHOCK.

Judgment reversed and new trial granted, costs to abide the event. Appeal from an order of the court at Trial Term, dismissing the complaint as to one of the defendants.

GOODRICH, P. J.: We think it was error to exclude the testimony as to the liquor license, and inasmuch as that evidence, coupled with the testimony as to Mrs. Schock's admissions of her relation to the store, would have required a submission of the case to the jury, the judgment must be reversed.

All concurred.

